LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 9 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 429

WILLIAM L. MAXWELL,

Petitioner,

v.

DAN D. STEPHENS, Superintendent of Arkansas State Penitentiary.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

GEORGE HOWARD, JR.
329½ Main Street
Pine Bluff, Arkansas

HAROLD B. ANDERSON
205 Century Building
Little Rock, Arkansas

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
LEROY D. CLARK
FRANK H. HEFFRON
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pennsylvania

Attorneys for Petitioner

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 4

Statement 7

Search and Seizure 8

Capital Punishment for Rape 13

Selection of Jury Panels 17

Jurisdiction of the District Court 18

REASONS FOR GRANTING THE WRIT 18

I. Certiorari should be granted to determine the legality of search of petitioner's home without a warrant, in petitioner's absence, under purported consent of his mother 18

A. The search and seizure issues are important, requiring consideration by this Court on certiorari 22

B. The decision below is wrong and sends petitioner to death in violation of his Fourth-Fourteenth Amendment rights 29

II. Certiorari should be granted to determine whether Arkansas' death penalty for rape is unconstitutional because (A) an unrebutted prima

PAGE

facie showing has been made of its racial application, in violation of the equal protection clause of the Fourteenth Amendment, or (B) its allowance to the jury of unfettered discretion to impose capital punishment for all offenses of rape, in the absence of aggravating circumstances, permits cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments 33

A. Petitioner's Equal Protection contention, wrongly rejected below presents an important question for consideration by this Court on certiorari 33

B. The Court should grant certiorari to consider petitioner's contention that his sentence is unconstitutional under the Eighth and Fourteenth Amendments 44

III. Certiorari should be granted to determine whether use of poll tax books containing racial designations, as required by statute, in the system of jury selection is constitutional 46

CONCLUSION 51

TABLE OF CASES

Aaron v. Holman, U.S. Dist. Ct., M.D. Ala., C.A. No. 2170-N 36
Abel v. United States, 362 U.S. 217 (1960) 21
Alabama v. Billingsley, Cir. Ct. Etowah County, No. 1159 36
Allison v. State, 204 Ark. 609, 164 S.W.2d 442 (1942) 44
Amos v. United States, 255 U.S. 313 (1921) 25, 29, 31

PAGE

Anderson v. Martin, 375 U.S. 399 (1964) 37, 48
Arnold v. North Carolina, 376 U.S. 733 (1964) 39
Avery v. Georgia, 345 U.S. 559 (1953) 48

Bailey v. Henslee, 287 F.2d 936 (8th Cir. 1961), cert. denied, 368 U.S. 877 39
Boyd v. United States, 116 U.S. 616 (1886) 32
Brown v. Board of Education, 347 U.S. 483 (1954) 37
Burge v. United States, 332 F.2d 171 (8th Cir. 1964), cert. denied, 379 U.S. 938 ..... 24, 25
Burge v. United States, 342 F.2d 408 (9th Cir. 1965) 28
Bush v. Kentucky, 107 U.S. 110 (1882) 38

Calhoun v. United States, 172 F.2d 457 (5th Cir. 1949) 27, 28
Carroll v. United States, 267 U.S. 132 (1925) 21, 28
Cassell v. Texas, 339 U.S. 282 (1950) 46
Channel v. United States, 285 F.2d 217 (9th Cir. 1960) 24
Chapman v. United States, 365 U.S. 610 (1961) 21, 29
Cline v. Frink Dairy Co., 274 U.S. 445 (1927) 43
Cobb v. Balkcom, 339 F.2d 95 (5th Cir. 1964) 50
Cofer v. United States, 37 F.2d 677 (5th Cir. 1930) 27
Commonwealth v. Wright, 411 Pa. 81, 190 A.2d 709 (1963) 22, 26
Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961) 39
Connally v. General Construction Co., 269 U.S. 385 (1926) 43
Cox v. Louisiana, 379 U.S. 536 (1965) 43
Craig v. Florida, Sup. Ct. Fla., No. 34,101 36
Cutting v. United States, 169 F.2d 951 (9th Cir. 1948) 28

Davis v. United States, 327 F.2d 301 (9th Cir. 1964) 23, 26, 28, 29

PAGE

Davis v. United States, 328 U.S. 582 (1946) 26
Dombrowski v. Pfister, 380 U.S. 479 (1965) 43
Driskill v. United States, 281 Fed. 146 (9th Cir. 1922) 28

Elmore v. Commonwealth, 282 Ky. 443, 138 S.W.2d 956 (1940) 31
Entick v. Carrington, 19 How. St. Tr. 1029 (C.P. 1765) 32
Escobedo v. Illinois, 378 U.S. 478 (1964) 32
Eubanks v. Louisiana, 356 U.S. 584 (1958) 40

Fay v. Noia, 372 U.S. 391 (1963) 50
Fisher v. United States, 324 F.2d 775 (8th Cir. 1963), cert. denied 377 U.S. 999 28
Foster v. United States, 281 F.2d 310 (8th Cir. 1960) 27
Fowler v. Rhode Island, 345 U.S. 67 (1953) 37
Frank v. Maryland, 359 U.S. 360 (1959) 32
Fredricksen v. United States, 266 F.2d 463 (D.C. Cir. 1959) 28
Freedman v. Maryland, 380 U.S. 51 (1965) 43
Frye v. United States, 315 F.2d 491 (9th Cir. 1963), cert. denied, 375 U.S. 849 22

Gatlin v. United States, 326 F.2d 666 (D.C. Cir. 1963) 22
Gomillion v. Lightfoot, 364 U.S. 339 (1960) 40
Gouled v. United States, 255 U.S. 298 (1921) 25

Hamilton v. Alabama, 376 U.S. 650 (1964) 37
Hamm v. Virginia State Board of Elections, 230 F. Supp. 156 (E.D. Va. 1964) aff'd sub nom. Tancil v. Woolls, 379 U.S. 19 ..... 46, 47
Hart v. United States, 316 F.2d 916 (5th Cir. 1963) 24
Henslee v. Stewart, 311 F.2d 691 (8th Cir. 1963), cert. denied, 373 U.S. 902 39
Hernandez v. Texas, 347 U.S. 475 (1954) 38, 40

PAGE

Herndon v. Lowry, 301 U.S. 242 (1937) 42
Hester v. United States, 265 U.S. 57 (1924) 21
Higgins v. United States, 209 F.2d 819 (D.C. Cir. 1954) 24
Holt v. State, 17 Wis.2d 468, 117 N.W.2d 626 (1962) 22
Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955) 28

Johnson v. United States, 333 U.S. 10 (1948) 21, 25, 30
Johnson v. Zerbst, 304 U.S. 458 (1938) 30, 50
Jones v. United States, 357 U.S. 493 (1958) 21
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) ... 43
Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951) ... 24

Lombard v. Louisiana, 373 U.S. 267 (1963) 42
Louisiana ex rel. Scott v. Hanchey, 20th Jud. Dist. Ct., Parish of West Feliciana 36
Louisiana v. United States, 380 U.S. 145 (1965) 43
Lustig v. United States, 338 U.S. 74 (1949) 29

McDonald v. United States, 307 F.2d 272 (10th Cir. 1962) 25
McDonald v. United States, 335 U.S. 451 (1948) 27
McLaughlin v. Florida, 379 U.S. 184 (1964) 40
Mapp v. Ohio, 367 U.S. 643 (1961) 23, 32
Martinez v. United States, 333 F.2d 405 (9th Cir. 1964) 23, 24
Mitchell v. Stephens, 232 F. Supp. 497 (E.D. Ark. 1964) 36
Moorer v. MacDougall, U.S. Dist. Ct., E.D.S.C., No. AC-1583 36
Mosco v. United States, 301 F.2d 180 (9th Cir. 1962), cert. denied, 371 U.S. 842 22

N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) 37

PAGE

N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 43
Neal v. Delaware, 103 U.S. 370 (1881) 38
Niemotko v. Maryland, 340 U.S. 268 (1951) 37
Norris v. Alabama, 294 U.S. 587 (1935) 40

Oyama v. California, 332 U.S. 633 (1948) 40

Pekar v. United States, 315 F.2d 319 (5th Cir. 1963) 24
Peterson v. City of Greenville, 373 U.S. 244 (1963) .. 42
Preston v. United States, 376 U.S. 364 (1964) 21
Ralph v. Pepersack, 335 F.2d 141 (4th Cir. 1964) 44
Reece v. Georgia, 350 U.S. 85 (1955) 40
Reed v. Rhay, 323 F.2d 498 (9th Cir. 1963), cert. denied, 377 U.S. 917 24
Rees v. Peyton, 341 F.2d 859 (4th Cir. 1965) 26, 28
Reszutek v. United States, 147 F.2d 142 (2d Cir. 1945) 28
Rios v. United States, 364 U.S. 253 (1960) 21, 23
Roberts v. United States, 332 F.2d 892 (8th Cir. 1964) 27, 28, 29
Robinson v. Florida, 378 U.S. 153 (1964) 42
Robinson v. United States, 325 F.2d 880 (5th Cir. 1964) 22
Romero v. United States, 318 F.2d 530 (5th Cir. 1963), cert. denied, 375 U.S. 946 28
Rorie v. State, 215 Ark. 282, 220 S.W. 2d 421 (1949) 44
Rudolph v. Alabama, 375 U.S. 889 (1963) 13, 44, 45

Sartain v. United States, 303 F.2d 859 (9th Cir. 1962), cert. denied, 371 U.S. 894 28
Shelley v. Kraemer, 334 U.S. 1 (1948) 37
Skinner v. Oklahoma, 316 U.S. 535 (1942) 45
Smith v. Cahoon, 283 U.S. 553 (1931) 43
State v. Hanna, 150 Conn. 457, 191 A.2d 124 (1963) 22
State v. Scrotsky, 39 N.J. 410, 189 A.2d 23 (1963) 22
Stein v. United States, 166 F.2d 851 (9th Cir. 1948) 29

PAGE

Stoner v. California, 376 U.S. 483 (1964) 21, 29, 32, 33
Swain v. Alabama, Ala. Sup. Ct., 7 Div. No. 699 36

Tatum v. United States, 321 F.2d 219 (9th Cir. 1963) 24
Teasley v. United States, 292 F.2d 460 (9th Cir. 1961) 28

United States ex rel. Goldsby v. Harpole, 263 F.2d 71 (5th Cir. 1959), cert. denied, 361 U.S. 838 50
United States ex rel. McKenna v. Myers, 232 F. Supp. 65 (E.D. Pa. 1964) 26, 28, 29
United States ex rel. Puntari v. Maroney, 220 F. Supp. 801 (W.D. Pa. 1963) 27
United States ex rel. Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962), cert. denied, 372 U.S. 924 50
United States ex rel. Stacey v. Pate, 324 F.2d 934 (7th Cir. 1963), cert. denied, 377 U.S. 937 (1964) 26
United States v. Arrington, 215 F.2d 630 (7th Cir. 1954) 23
United States v. Block, 202 F. Supp. 705 (S.D.N.Y. 1962) 26
United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951) 32
United States v. Boston, 330 F.2d 937 (2d Cir. 1964), cert. denied, 377 U.S. 1004 28
United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962) 28
United States v. Evans, 194 F. Supp. 90 (D.D.C. 1961) 24
United States v. Goodman, 190 F. Supp. 847 (N.D. Ill. 1961) 26
United States v. Haas, 106 F. Supp. 295, 109 F. Supp. 443 (W.D. Pa. 1952) 24, 25
United States v. Heine, 149 F.2d 485 (2d Cir. 1945) 25
United States v. Hilbrich, 341 F.2d 555 (7th Cir. 1965) 22
United States v. Horton, 328 F.2d 132 (3rd Cir. 1964), cert. denied, 377 U.S. 970 22
United States v. Jeffers, 342 U.S. 48 (1951) 21, 29

PAGE

United States v. MacLeod, 207 F.2d 853 (7th Cir. 1953) 24, 25
United States v. Minor, 117 F. Supp. 697 (E.D. Okla. 1953) 24
United States v. Mitchell, 322 U.S. 65 (1944) 25
United States v. Page, 302 F.2d 81 (9th Cir. 1962) 23
United States v. Pugliese, 153 F.2d 497 (2d Cir. 1945) 27
United States v. Rabinowitz, 339 U.S. 56 (1950) 21
United States v. Rivera, 321 F.2d 704 (2d Cir. 1963) 25
United States v. Roberts, 179 F. Supp. 478 (D. D.C. 1959) 24, 25
United States v. Ruffner, 51 F.2d 579 (D. Md. 1931) 27
United States v. Rykowski, 267 Fed. 866 (S.D. Ohio 1920) 27
United States v. Sergio, 21 F. Supp. 553 (E.D.N.Y. 1937) 27
United States v. Sferas, 210 F.2d 69 (7th Cir. 1954), cert. denied, 347 U.S. 935 ..... 26, 27
United States v. Smith, 308 F.2d 657 (2d Cir. 1962-63), cert. denied, 572 U.S. 906 22
United States v. Walker, 197 F.2d 287 (2d Cir. 1952), cert. denied, 344 U.S. 877 27
United States v. Walker, 190 F.2d 481 (2d Cir. 1951), cert. denied, 342 U.S. 868 27
United States v. Ziemer, 291 F.2d 100 (7th Cir. 1961), cert. denied, 368 U.S. 877 24
United States v. Zimmerman, 326 F.2d 1 (7th Cir. 1963) 28

Villano v. United States, 310 F.2d 680 (10th Cir. 1962) 22
Von Eichelberger v. United States, 252 F.2d 184 (9th Cir. 1958) 28

PAGE

Waldron v. United States, 219 F.2d 37 (D.C. Cir. 1955) 26, 29
Watson v. City of Memphis, 373 U.S. 526 (1963) 37
Whitus v. Balkcom, 333 F.2d 496 (5th Cir. 1964), cert. denied, 379 U.S. 931 50
Williams v. United States, 263 F.2d 487 (D.C. Cir. 1959) 26
Winters v. New York, 333 U.S. 507 (1948) 43
Wion v. United States, 325 F.2d 420 (10th Cir. 1963), cert. denied, 377 U.S. 946 28
Woodard v. United States, 254 F.2d 312 (D.C. Cir. 1958), cert. denied, 357 U.S. 930 28

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 37

Zap v. United States, 328 U.S. 624 (1946) 26

STATUTES

10 U.S.C. §920 (1964) 34

18 U.S.C. §2031 (1964) 34

28 U.S.C. §1254(1) (1948) 2

28 U.S.C. §2241 (1958) 18

REV. STAT. §1977 (1875), 42 U.S.C. §1981 (1964) 37

Supreme Court Rule 19(1) (b) 22

Civil Rights Act of 1866, Ch. 31, §1, 14 Stat. 27 ..... 36, 38

Enforcement Act of May 31, 1870, ch. 114, §§16, 18, 16 Stat. 140, 144 36

ALA. CODE §§14-395, 14-397, 14-398 (1958) 33
ARK. STAT. ANN. §3-118 (1956) 4, 17

PAGE

ARK. STAT. ANN. §3-227 (1956) 4, 17
ARK. STAT. ANN. §39-208 (1962) 6, 17
ARK. STAT. ANN. §§41-805 to 41-810 (1964) 42
ARK. STAT. ANN. §41-3403 (1964) 7, 8, 13, 33
ARK. STAT. ANN. §41-3405 (1964) 33
ARK. STAT. ANN. §41-3411 (1964) 33
ARK. STAT. ANN. §43-2153 (1964) 7, 13, 33
ARK. STAT. ANN. §§46-144, 145 (1964) 42
ARK. STAT. ANN. §§55-104, 105 (1947) 42
ARK. STAT. ANN. §73-1218 (1957) 42
ARK. STAT. ANN. §73-1614 (1957) 42
ARK. STAT. ANN. §73-1747 (1957) 42
ARK. STAT. ANN. §76-1119 (1957) 42
ARK. STAT. ANN. §80-509 (1960) 42
ARK. STAT. ANN. §80-2401 (1960) 42
ARK. STAT. ANN. §84-2724 (1960) 42

D. C. CODE ANN. §22-2801 (1961) 34

FLA. STAT. ANN. §794.01 (1964) 33

GA. CODE ANN. §26-1302 (1963) 33
GA. CODE ANN. §26-1304 (1963) 34

KY. REV. STAT. ANN. §435.090 (1963) 34

LA. REV. STAT. ANN. §14:42 (1950) 34

MD. ANN. CODE, art. 27, §12 34
MD. ANN. CODE, art. 27, §§461, 462 (1957) 34
MISS. CODE ANN. §2358 (1956) 34
VERNON'S MO. STAT. ANN. §559.260 (1953) 34

NEV. REV. STAT. §200.360 (1963) 33
NEV. REV. STAT. §200.400 (1963) 33
N.C. GEN. STAT. §14-21 (1953) 34

PAGE

OKLA. STAT. ANN., tit. 21, §1111 (1958) 34
OKLA. STAT. ANN., tit. 21, §§1114, 1115 (1958) 34

S.C. CODE ANN. §16-72 (1962) 34
S.C. CODE ANN. §16-80 (1962) 34

TENN. CODE ANN. §§39-3702, 39-3703, 39-3704, 39-3705 (1955) 34
TEX. PEN. CODE ANN., art. 1183 (1961) 34
TEX. PEN. CODE ANN., art. 1189 (1961) 34

VA. CODE ANN. §18.1-16 (1960) 34
VA. CODE ANN. §18.1-44 (1960) 34

OTHER AUTHORITIES

WEIHOFEN, THE URGE TO PUNISH, 164-165 (1956) 42

Bullock, *Significance of the Racial Factor in the Length of Prison Sentences*, 52 J. CRIM. L., CRIM. & POL. SCI. 411 (1961) 42

Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 STAN. L. REV. 5 (1949) 36

Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8 (1952) 42

Lewis, *The Sit-In Cases: Great Expectations*, [1963] SUPREME COURT REVIEW 101 43

Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964) 44

tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 CALIF L. REV. 171 (1951) 36

Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices*, 34 ROCKY MT. L. REV. 150 (1962) 23

PAGE

Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted among Admissions to Death Row*, 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962) 42

Comment, 69 DICK. L. REV. 69 (1964) 22

Note, 51 CALIF. L. REV. 1010 (1963) 22

Note, U. ILL. L. FORUM (1964) 22

Note, 109 U. PA. L. REV. 67 (1960) 35

Note, 113 U. PA. L. REV. 260 (1964) 22

Note, WIS. L. REV. 119 (1964) 22

Annot., 31 A.L.R. 2d 1078 (1953) 22

CONG. GLOBE, 39th Cong., 1st Sess. 475 (Jan. 29, 1866) 1759 (4/4/1866) 38

CONG. GLOBE, 39th Cong., 1st Sess. 1758 (April 4, 1866) 38

New York Times, July 24, 1965, p. 1, col. 5 45

UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, No. 32: *Executions*, 1962 (April 1963) 43

IN THE

Supreme Court of the United States

October Term, 1965

No. .....

WILLIAM L. MAXWELL,

Petitioner,

v.

DAN D. STEPHENS, Superintendent of Arkansas State Penitentiary.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on June 30, 1965.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit (C.A. 1)[1] and the dissenting opinion of Judge Ridge (C.A. 24) are as yet unreported. They are set forth in

---

[1] The certified record, which is not printed, consists of six volumes. Volume I contains the record of proceedings in the district court except for the transcript of the hearing. It is cited as D.C. ——.

Volumes II and III, paginated consecutively, contain the complete record of proceedings in the Garland County Circuit Court and are cited as Ark. ——.

Volume IV is the transcript of the hearing in the district court and is cited as Tr. ——.

Volume V contains depositions and is not cited in this petition.

Volume VI contains the opinion and orders of the court of appeals and is cited as C.A. ——.

the appendix,[2] pp. 2a, 26a. The opinion of the United States District Court for the Eastern District of Arkansas (D.C. 39) is reported at 229 F. Supp. 205 and is set forth in the appendix, p. 30a. The opinion of the Supreme Court of Arkansas is reported at 236 Ark. 694, 370 S.W. 2d 113 and is set forth in the appendix, p. 55a.

Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit was rendered on June 30, 1965 (C.A. 28). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Petitioner, a Negro, was detained at the police station on suspicion of rape of a white woman. His requests to use a phone to call a lawyer or his family at home were denied. Two white policemen went to his home at 5:00 a.m. to obtain evidence. They had no warrant. Only petitioner's mother and two younger brothers were at home. The policemen were admitted by petitioner's mother. They searched petitioner's room and obtained a coat belonging to him. The coat was used at his trial, which resulted in a sentence of death.

a) Where petitioner's mother was visibly upset, did not know of her right to resist a warrantless search, and was not informed of that right, did her acquiescence in the search and seizure satisfy the requirements of voluntariness and understanding requisite to waiver of Fourth-Fourteenth Amendment rights?

---

[2] The appendix is separately bound.

b) If the answer to question (a) is yes, did acquiescence by petitioner's mother waive petitioner's Fourth-Fourteenth Amendment rights as well as her own?

2. Where petitioner, a Negro sentenced to death for the rape of a white woman, has shown that nine times as many Negroes as whites have been executed for rape in Arkansas although in three representative counties (to which inquiry was limited) an equal number of Negroes and whites have been convicted of rape, may the State deny that racial discrimination violating the equal protection clause of the Fourteenth Amendment produced such a result without submitting proof that impartial and non-arbitrary factors explain the grossly disproportionate number of Negro executions?

3. Does Arkansas' granting to the jury of unfettered discretion to impose capital punishment for all offenses of rape, irrespective of the existence of aggravating circumstances, permit cruel and unusual punishment in violation of the Fourteenth Amendment?

4. Did the system of selecting petit jurors used in Garland County satisfy the equal protection clause of the Fourteenth Amendment where the qualifications of all prospective jurors were determined by reference to poll tax books which, pursuant to state statute, designated the race of each elector?

Constitutional and Statutory Provisions Involved

This case involves the Fourth, Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

This case also involves the following Arkansas statutes:

ARKANSAS STATUTES ANNOTATED, §3-118 (1956):

3-118. *List of poll tax payers furnished county clerk and election commissioners.*—Not later than the 15th day of October of each year the collector shall file with the county clerk a list containing the correct names, alphabetically arranged (according to the political or voting townships, and according to color) of all persons who have up to and including October 1st of that year paid the poll tax assessed against them respectively. The correctness of this list shall be authenticated by the affidavit of the collector in person. The county clerk shall at once record the said list in a well bound book to be kept for that purpose . . . .

ARKANSAS STATUTES ANNOTATED, §3-227 (1956):

3-227. *Evidence of right to vote—Filing and return of documents—Additional list of voters—Poll tax receipts, requirements—Certified poll tax lists—Rejection of ballots.*—No person shall be allowed to vote at any primary election held under the laws of this State, who shall not exhibit a poll tax receipt, or other evidence that he has paid his poll tax within the time prescribed by law to entitle him to vote at the succeeding general State election. Such other evidence shall be:

(a) A copy of such receipt duly certified by the clerk of the county court of the county where such tax was paid.

(b) Or, such person's name shall appear upon the list required to be certified to the judges of election by section three of Act 320 of Acts of 1909 [§3-118].

Or, if any person offering to vote shall have attained the age of twenty-one [21] years since the time of assessing taxes next preceding such election, which period of assessment is here declared to mean between the second Monday in May and the second Monday in September of each year, and possesses the other necessary qualifications, and shall submit evidence by written affidavit, satisfactory to the judges of election, establishing that fact, he shall be permitted to vote.

All such original and certified copies of poll tax receipts and written affidavits shall be filed with the judges of election and returned by them with their other returns of election, and the said judges of election shall, in addition to their regular list of voters, make an additional list upon their poll books of all such persons permitted by them to vote, whose names do not appear on the certified list of poll tax payers, and such poll books shall have a separate page for the purpose of recording names of such persons.

It shall be the duty of each elector, at the time of payment of his poll tax, to state, and it shall be the duty of the collector to record and certify in his receipt evidencing the payment of such poll tax, the color, residence, postoffice address (rural route, town or street address), voting precinct, and school district, of such person at the time of the payment of such tax, and all poll tax receipts not containing such requirements shall be void and shall not be recognized by the judges of election; provided, however, it shall not be necessary to state or have certified the street address of any such person in cities and towns where the numbering of houses is not required by the ordinances thereof.

The certified lists required by section 3 of Act 320 of 1909 [§3-118] shall contain, in addition to the name of the person paying such poll tax, his color, residence, post-office address (rural route, town, or street address where by ordinance the numbering of houses is required), the school district and voting precinct, and such list shall be arranged in alphabetical order, according to the respective voting precincts. The county election commissioners shall supply the judges of primary elections with printed copies of such lists. . . .

ARKANSAS STATUTES ANNOTATED §39-208 (1962):

Preparation of lists of petit jurors and alternates—Indorsement of lists.—The commissioners shall also select from the electors of said county, or from the area constituting a division thereof where a county has two [2] or more districts for the conduct of circuit courts, not less than twenty-four (24) nor more than thirty-six (36) qualified electors, as the court may direct, having the qualifications prescribed in Section 39-206 Arkansas Statutes 1947 Annotated to serve as petit jurors at the next term of court; and when ordered by the court, shall select such other number as the court may direct, not to exceed twelve [12] electors, having the same qualifications, for alternate petit jurors, and make separate lists of same, specifying in the first list the names of petit jurors so selected, and certify the same as the list of petit jurors; and specifying in the other list the names of the alternate petit jurors so selected, and certifying the same as such; and the two [2] lists so drawn and certified, shall be enclosed, sealed and indorsed "lists of petit jurors" and delivered to the court as specified in Section 39-207, Arkansas Statutes 1947, Annotated for the list of grand jurors.

ARKANSAS STATUTES ANNOTATED §41-3403 (1962):

41-3403. *Penalty for Rape.*—Any person convicted of the crime of rape shall suffer the punishment of death [or life imprisonment]. [Act Dec. 14, 1842, §1, p. 19; C. & M. Dig., §2719; Pope's Dig., §3405.]

ARKANSAS STATUTES ANNOTATED §43-2153 (1962):

43-2153. *Capital cases—Verdict of life imprisonment.*—The jury shall have the right in all case where the punishment is now death by law, to render a verdict of life imprisonment in the State penitentiary at hard labor.

Statement

Petitioner William L. Maxwell, a Negro, was charged by information for the crime of rape on November 7, 1961 (Ark. 1). He was convicted in the Circuit Court of Garland County, Arkansas, and sentenced to death on April 5, 1962 (Ark. 42). The conviction was affirmed by the Supreme Court of Arkansas, and rehearing was denied.

A petition for writ of habeas corpus was filed in the United States District Court for the Eastern District of Arkansas on January 20, 1964 (D.C. 1). It alleged, *inter alia*, that the number of Negroes on jury panels in Garland County was systematically and intentionally limited through the use of poll tax books designating the race of qualified jurors (D.C. 2-3). On January 21, 1964, the district court issued an order to show cause and a stay of execution (D.C. 6). On January 31, 1964, the court permitted an amendment to the habeas corpus petition alleging that clothing of petitioner was seized during an unlawful search and introduced at trial (D.C. 11-13). On February 12, 1964, petitioner filed a second amendment, alleging that Ark.

Stat. Ann. §41-3403 (1962 Repl. Vol.), providing for the death penalty upon conviction of rape, was applied with unequal severity against Negroes (D.C. 33). It was alleged that imposition of the death penalty in rape cases not involving loss of life was erratic and in conflict with the mores, principles and basic concepts of fairness of civilized societies (D.C. 34). At the hearing on February 12, 1964, the district court permitted the filing of the second amendment (Tr. 22).

Following the hearing held on February 12, 13, and 27, the district court dismissed the petition for writ of habeas corpus and vacated the stay of execution on May 6, 1964 (D.C. 62). On May 19, 1964, petitioner filed notice of appeal (D.C. 70). The district court granted a petition for certificate of probable cause for appeal and stayed execution pending appeal (D.C. 67).

The United States Court of Appeals for the Eighth Circuit affirmed on June 30, 1965 (C.A. 1, 28), Judge Ridge dissenting on the search and seizure issue (C.A. 24).

On July 13, 1965, the court of appeals granted a stay of the mandate for thirty days. If the clerk of the court of appeals receives within that time period a certificate from the clerk of this Court that a petition for writ of certiorari has been filed, the stay is to continue in effect until final disposition of the case by this Court (C.A. 29).

Search and Seizure

In his amended petition for the writ of habeas corpus, petitioner contended that his Fourteenth Amendment rights against unreasonable search and seizure had been violated by the use made at his trial of a blue coat seized from his

bedroom closet by police officers acting without a warrant (D.C. 11). The court of appeals found that the

> blue coat in question was obtained from that closet. It was eventually sent to the FBI laboratory. At the trial there was expert testimony that fibers in the coat matched others found on the victim's pajamas and on part of a nylon stocking picked up near the scene of the crime, and that fibers in the pajamas matched those found on the coat (C.A. 17).

Accordingly, the court of appeals—as had the district court—entertained petitioner's Fourth-Fourteenth Amendment contentions on the merits (C.A. 16; see D.C. 45). It rejected those contentions, finding that the warrantless seizure of the coat was validated by consent given the officers, in petitioner's absence following his arrest, by petitioner's mother (C.A. 23).

The facts surrounding the search and seizure may be concisely stated by adopting the findings of the court of appeals, with a few additions supported by the testimony of police officers or by the uncontradicted testimony of petitioner's witnesses in the district court. In the paragraphs which follow, the quoted portions are taken from the circuit court's opinion (C.A. 16-18); bracketed insertions with record references are from the transcript in the district court.

". . . The offense took place at approximately three o'clock in the morning of November 3, 1961. It was raining and wet. The victim was promptly taken by the police to a hospital. At the hospital she described her assailant to Captain Crain of the Hot Springs Police Department and to Officer O.D. Pettus, a Negro. She stated that the man had told her he was Willie C. Washington. Two persons with that name, senior and junior, were brought before her

but she identified neither. [A third Negro man was also brought in but not identified. (Tr. 256, 258, 262-263; testimony of Captain Crain and of the victim.)] She described her attacker in greater detail. Pettus thereupon suggested that it might have been Maxwell. Officer Childress, who was on car patrol duty and in uniform at the time, was directed by radio to pick up Maxwell. He went to the Maxwell home. The defendant's mother, then age 38, answered his knock. [Maxwell's father was then away from home at work. (Tr. 159; uncontradicted testimony of Maxwell's father.)] He told her he wanted to talk to William. She let him enter, checked to see if her son was in, and led Childress to the bedroom occupied by Maxwell and two younger sons. [Childress awakened Maxwell by shining a flash in his face. (Tr. 135, 186-187; uncontradicted testimony of Maxwell's mother and Maxwell.)] Childress told Maxwell he wanted to talk to him down town and asked him to dress. Childress testified that Maxwell went to the closet for clothes that were hanging there in a wrapper, and that he asked him 'to put on these other clothes here that he had on.' The latter were wet. Maxwell testified that he was told to put on the clothes he had on that night, that he went to the closet to get these, that he was then told to put on the clothes folded on the chair, that he was going to take those clothes to the cleaners, and that they were not his. [It is uncontested that Maxwell objected to wearing the clothes on the chair, which he said were wet and not his, but that Childress told him to put them on anyway. (Tr. 267; testimony of Officer Childress.)]

[Maxwell's mother testified that she was upset at this time. (Tr. 135.) At the hearing below, Childress was asked whether he had advised Maxwell or his parents (sic) that they were entitled to consult with an attorney, and replied: "No, I didn't give them any advice at all because I didn't

know whether he was being arrested or what. I just received the call over the radio to go pick him up. I didn't know what it was." (Tr. 267.)]

"Maxwell was taken to the hospital and before the victim. She at first did not identify him as her attacker but witnesses described her as visibly disturbed and shaking when he stood before her. She later said she recognized him but feared for her life if she identified him. Maxwell was taken from the hospital to the police station.

[The district court found "that when petitioner was taken into custody and incarcerated in the City Jail he was not permitted to see his parents or a lawyer." (D.C. 49.) This finding was based on petitioner's testimony that "I asked them could I use the telephone to call my—my mother, somebody to come up, a lawyer or something, and they told me I weren't going to use the phone or nothing . . ." (Tr. 189; see also Tr. 190.) The testimony is uncontradicted; Captain Crain testified only that he did not advise petitioner of his right to consult an attorney (Tr. 250), and that he made no attempt to bring petitioner before a magistrate because there was no magistrate's court until 9:00 a.m., the magistrate had traffic court at that time, and "We still had not completed our investigation." (Tr. 253.) Petitioner's incommunicado detention continued for two or three days thereafter in the jail to which he had been removed to avoid mobbing. (Tr. 192-196; uncontradicted testimony of petitioner.)]

"Both sides admit that the exact times and place of Maxwell's arrest 'is not entirely clear from the record'. It might have been at the home at about four a.m. or shortly thereafter at the hospital.

"Captain Crain, with Officer Timms, went to the Maxwell home about five a.m. to get, as he testified at the habeas

corpus hearing, 'some more clothes that we thought might help us in our investigation of this case' or, as he testified at the trial, 'I was looking for a particular object . . . I wanted what he was wearing that night'. They had no search warrant. Mrs. Maxwell permitted them to enter. [She testified below: "I did not know nothing about asking the officer for a search warrant. I didn't—I just didn't know . . ." (Tr. 146.) And, again, responsive to a question why she had not asked the officers for a warrant: "Because I didn't know—know to just quite honestly I didn't know—I was—well, I was half asleep and I just wasn't—didn't think to ask him. And I kept—my children were all at home and I just didn't think anything were wrong." (Tr. 156.)] They were in uniform. The testimony is in conflict as to whether Mrs. Maxwell was then informed of any charge against her son; Crain said he so advised her but she stated, 'He didn't say nothing about no rape case'. (The district court found she had been so advised). She directed the officers to the clothes closet. . . . [Captain Crain testified that Officer Timms checked the closet while he, Crain, talked to petitioner's mother. "Well, we—I felt sorry for her. She was in—well, she wasn't feeling any too good being—having a thing like that happen and her son being accused." (Tr. 243.)]

"Mrs. Maxwell was understandably upset at the times the officers called at her home. In the margin we quote her testimony as to both the first call[12] and the second call.[13]

---

[12] ". . . it was late and I was asleep and someone knocked on the door and I woke up and I asked who was it and he said the policeman and I went to the door to let him in. He asked me did I have a son here by the name of William and I told him yes and he just come on in, he didn't have a search warrant or anything and I let him. I didn't know any better myself but I—I didn't know that he—you know, everything was all right, my children were at home and all and I just let him in."

[13] "I opened the door and I was afraid not to let them in because—you know—when they said they were police officers—well, you

> just—I've just always—I just let the police officers in because I just feel like he is for peace and all, and I just—I don't know, I didn't know anything—I never been in anything like this and I just let them in and I still didn't think anything, didn't any of those officer (sic) have any search warrant or anything, didn't show me anything like that."

Maxwell's father worked at night and was not home when the officers called."

[Asked at the hearing below whether he had told Mrs. Maxwell that she did not have to relinquish the items of clothing to him, Captain Crain replied that he did not recall. (Tr. 248.) He testified flatly that he did not mention to Mrs. Maxwell that things taken could be used in evidence against her son. (Tr. 249.)]

Capital Punishment for Rape

Petitioner's second amended petition in the district court challenged the constitutionality in their application to him of the Arkansas statutes allowing capital punishment for rape in the discretion of the jury. ARK. STAT. ANN. §§41-3403, 43-2153 (1964 Repl. Vols.), p. 7, *supra*. He contended that prosecutors and juries applied the statutes racially, in that Negroes convicted of rape upon white women were usually sentenced to death, while other classes of rape convicts usually received lesser sentences (D.C. 33); that the death sentence in his case "where life has not been forfeited is so erratic so as to deny due process of law" and equal protection of the laws (D.C. 34); and that in such a case the death sentence constituted cruel and unusual punishment (D.C. 34).[3] In support of the

---

[3] The language of part (2), para. 3, of the second amendment to the petition paraphrases the language of the opinions dissenting from denial of certiorari in *Rudolph* v. *Alabama*, 375 U.S. 889 (1963) (D.C. 34), and was understood by the district court to raise an Eighth-Fourteenth Amendment issue (Tr. 10-13).

claim of racial discrimination, petitioner's counsel sought leave to take testimony of certain state officials, and to submit to the prosecutors or clerks of court of the 72 Arkansas counties not to be covered by oral testimony interrogatories or questionnaires inquiring with respect to all rape prosecutions after January 1, 1954 the name and race of the defendant, the race of the prosecutrix, the extent to which deadly force was attempted or employed in the course of the offense, and the disposition including sentence.[4] Counsel for the State expressed doubt that such information could be supplied by the prosecutors or county clerks (Tr. 312-313), and the district court thereupon declined "to go into an expedition of trying to submit it to the 72—72—75 clerks when I am convinced that they cannot furnish most of it." (Tr. 313.) However, over the strenuous objection of State's counsel (Tr. 314-317), and notwithstanding the court's disposition to believe "that the information that the petitioner is trying to obtain can't be obtained" (Tr. 317), the court did agree, as a "trial run" (Tr. 317) to hear testimony of state officials for three counties, in order to "see how fruitful it might be on a smaller basis" (Tr. 318; see Tr. 317-321). Accordingly, petitioner presented the testimony of the circuit clerk, sheriff and prosecuting attorney of Garland County (Tr. 327-356), the circuit clerk and prosecuting attorney of Pulaski County (Tr. 357-385), and the circuit

[4] The request to take depositions and to submit interrogatories and questionnaires was first made in the second amendment to the petition (D.C. 34). It was pressed at the hearing (Tr. 6-10, 14-26) and, following an initially inconclusive disposition (Tr. 25-26), renewed (Tr. 227). The district court asked counsel for the petitioner to prepare for the court's consideration the sort of interrogatories he wished to submit (Tr. 228-229); this was done (Tr. 311-312); and petitioner's request for leave to submit the interrogatories renewed again (Tr. 310-311). After the district court determined to permit testimony limited to three counties as a "trial run" (see text *infra*), petitioner's counsel put the draft questionnaire into the record to preserve his point (Tr. 321).

clerk, sheriff and prosecuting attorney of Jefferson County (Tr. 386-421). The evidence given by these officials is summarized in the margin, substantially in the words of the court of appeals.[5] It demonstrated, first, that the information sought by the petitioner was, for the most part, available: of 59 defendants charged in three counties over ten years, the race of all but four defendants was known; the race of 47 of their 63 victims was known; and dispo-

---

[5] The quoted passage which follows is from the opinion of the court of appeals (C.A. 7-8). Bracketed insertions supply omitted information, derived from the testimony of the state officials at Tr. 327-421.

> "As to Garland County, for the decade beginning January 1, 1954, Maxwell's evidence was to the effect that seven whites were charged with rape (two of white women and the race of the other victims not disclosed), with four whites not prosecuted and three sentenced on reduced charges; that three Negroes were charged with rape, with one of a Negro woman not prosecuted and another of a Negro receiving a reduced sentence, and the third, the present defendant, receiving the death penalty. With respect to Pulaski County for the same decade, there were 11 whites (two twice) and 10 Negroes charged, with the race of the victim of two whites and one Negro not disclosed. Three whites received a life sentence. [Two of these had white victims; the third, a victim of undisclosed race.] One white was acquitted of rape of a Negro woman. One received a sentence on a reduced charge [victim, white], two were dismissed [victims, white], two cases remained pending [victims, white], one was not prosecuted [victim of undisclosed race], and the last was executed on a conviction for murder [victims, white; two rape charges were nol prossed]. Of the Negroes, three with white victims and two with Negro victims received life. One case was dismissed [victim of undisclosed race], one was not arrested [victim, white], two with Negro victims were sentenced on reduced charges, and one, Bailey, with a white victim, was sentenced to death. In Jefferson County eight Negroes were charged, with the cases against five dismissed [victims, one white, one Negro, three of undisclosed race], another dismissed when convicted on a murder charge [victim of undisclosed race], and two receiving sentences on reduced charges [victims, Negro]. Sixteen whites were charged. One was charged three times with respect to Negro victims and as to two of these charges received five years suspended on a guilty plea. [The remainder had white victims, except in the single case indicated *infra*.] Two others received three year sentences. One is pending, one was executed, and the rest were dismissed [one of these latter having a victim of undisclosed race.] The race of four defendants was not disclosed; three of these cases were dismissed and one is pending."

sitions of all prosecutions, including sentence, were known. Second, the evidence showed that for the counties and period covered, Negroes were charged with rape considerably less frequently than whites (by a ratio of 2:3) and were convicted of rape no more frequently than whites. Specifically, the figures are:

		Garland	Pulaski	Jefferson	Total
Number of defendants charged	White	7	11 (two twice)	16 (one thrice)	34 (two twice) (one thrice)
	Negro	3	10	8	21
	Total	10	21	28 (four unknown race)	59
Number of defendants convicted of rape	White	0	3	4 (one twice)	7 (one twice)
	Negro	1	6	0	7
	Total	1	9	4	14
Number of defendants sentenced to death	White	0	0	1	1
	Negro	1	1	0	2
	Total	1	1	1	3

On the basis of evidence in the state court transcript, it further appears, as found by the court of appeals, "that, in the 50 years since 1913, 21 men have been executed for the crime of rape [in Arkansas]; that 19 of these were Negroes and two were white; that the victims of the 19 convicted Negroes were white females; and that the victims of the two convicted whites were also white females." (C.A. 7.) The court of appeals held, as did the district court, that this was an insufficient showing of racially discriminatory application of the death penalty for rape (C.A. 8; see D.C. 60), and both courts refused to give consideration to petitioner's contention that capital punishment for rape was cruel and unusual punishment, the circuit court saying that a declaration of the unconstitutionality of the death penalty on this ground "must be for the Supreme Court in the first instance and not for

us." (C.A. 11-12; and see the district court's similar disposition at D.C. 61).

Selection of Jury Panels

In Garland County, Arkansas, petit jury lists were selected by a jury commission consisting of three commissioners, who met periodically to draw up a list of names (Tr. 47, 64). They relied primarily on their knowledge of persons in the community (Tr. 61), but also used a telephone book (Tr. 60, 77) and a list of persons who had previously served (Tr. 55, 77).

At the time of petitioner's trial, only qualified electors who had paid the poll tax were eligible to be jurors. Ark. Stat. Ann. §3-227 (1956); §39-208 (1962). The jury commissioners checked the poll tax books to determine whether the persons they had selected were qualified (Tr. 70, 80). An Arkansas statute required that poll tax books designate the race of all qualified electors. Ark. Stat. Ann. §3-118. The poll tax book for September 1961, introduced in evidence as Exhibit I, showed a small "c" after the names of Negro electors (Tr. 57, 59).

After the jury commission completed the jury list, the commission transmitted the list to the circuit clerk (Tr. 99-101). The circuit clerk for Garland County between 1955 and 1963 testified that the lists had "c's" after the names of Negroes when he received them (Tr. 48-50). The clerk also testified that he copied the lists, placing the names and racial markings into a jury book (Tr. 42).

The issue of discriminatory selection of jury panels was not raised in the state courts. Following petitioner's apprehension on November 3, 1961, two attorneys were appointed to defend him on November 28, 1961 (Ark. 2). They were discharged at their request on February 5,

1962 (Ark. 15). On January 31, 1962, Attorney Christopher C. Mercer was hired to defend petitioner (Ark. 13). Mercer discussed many aspects of the case with petitioner, including the jury panel, but he did not discuss with petitioner whether to raise the issue of racial discrimination in the jury selection process (Tr. 298, 305-306).

Jurisdiction of the District Court

Jurisdiction of the United States District Court for the Eastern District of Arkansas was based on 28 U.S.C. §2241.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to determine the legality of search of petitioner's home without a warrant, in petitioner's absence, under purported consent of his mother.

Two issues arising out of the search of petitioner's home and seizure of his clothing without a warrant call for the exercise of this Court's certiorari jurisdiction. The State of Arkansas seeks to support the search and seizure under consent given by petitioner's mother in his absence following his arrest. Petitioner contends, first that his mother's acquiescence in the search and seizure was not voluntary and understanding; second, that her acquiescence could in no event effect a waiver of petitioner's Fourth-Fourteenth Amendment rights. The district court rejected petitioner's contentions on one theory and the court of appeals on another, Judge Ridge dissenting. On this foundation, relief against the death penalty has been denied.

The facts surrounding the search and seizure issues have been set forth at pp. 8-13, *supra*. Except in a minor point, they are uncontested. A white police officer went to the home of petitioner's Negro family in Hot Springs, Arkansas, shortly before 4:00 a.m. Petitioner's father was away at work; petitioner's 38 year old mother, petitioner, and two brothers were at home asleep. The officer woke petitioner's mother by knocking at the door. She asked who was there; he said it was a policeman; she let him in. "He asked me did I have a son here by the name of William and I told him yes and he just come on in, he didn't have a search warrant or anything and I let him in. I didn't know any better myself, but I—I didn't know that he—you know, everything was all right, my children were at home and all and I just let him in." P. 12, *supra*. Once inside, the officer awakened petitioner by shining a flashlight in his face and told him to get dressed. He refused to permit petitioner to put on the clothing chosen by petitioner, ordered him to put on other clothing. Petitioner was told that he was being taken to the police station, that the police wanted to talk to him. He was not told why. Petitioner's mother was not told that she could call an attorney; she was not told the charges against petitioner; the officer "didn't give them any advice at all because I didn't know whether he was being arrested or what." Pp. 10-11, *supra*.

Petitioner was taken to a hospital for identification by a white rape victim, then to the police station where he was held incommunicado and refused permission to phone a lawyer or his parents. One hour later, two white police officers returned to petitioner's home. Petitioner was then incarcerated; it was about 5:00 a.m.; and although the officers went for the specific purpose of obtaining clothing which would incriminate petitioner, they sought no search warrant. Petitioner's father was still not home. They

asked petitioner's mother if they could come in take some of petitioner's clothing. She let them in and directed them to the closet. "I opened the door and I was afraid not to let them in because—you know—when they said they were police officers—well, you just—I've just always—I just let the police officers in because I feel like he is for peace and all, and I just—I don't know, I didn't know anything—I never been in anything like this and I just let them in and I still didn't think anything, didn't any of those officer have a search warrant or anything, didn't show me anything like that." P. 12, *supra*. "I did not know nothing about asking the officer for a search warrant." P. 12, *supra*. Petitioner's mother testified below that the officers had not told her the charges against her son. Crain contradicted this, said that he told her the charges and—as might be expected of a Negro mother whose son is charged with rape of a white woman in Arkansas—"well, she wasn't feeling any too good being—having a thing like that happen and her son being accused." P. 12, *supra*. In any event, the mother's testimony that she did not know the officers needed a warrant to make the search was uncontested. Captain Crain said he did not recall that he told Mrs. Maxwell she need not relinquish the clothing, and testified flatly that he did not advise her the clothing could be used against her son. While he was talking to her, his companion officer took the coat which provided a damaging link in the evidence later used to support petitioner's conviction and sentence of death.

On this record, the district court found that it was the mother's "free and voluntary choice to permit the police to enter and search the closet." (D.C. 49.) "However, the propriety of the search and seizure need not rest solely upon the consent given by petitioner's mother. The lawfulness of this search and seizure is based upon a consi-

deration of all the facts and circumstances. . . . [T]here was nothing unfair, unreasonable or oppressive in the conduct of the police in the performance of the search and seizure. . . ." (D.C. 49.) Apparently recognizing the untenability of this latter ground,[6] the court of appeals

---

[6] Although language in some of this Court's cases has suggested that the test of validity of a search and seizure under the Fourth Amendment is general reasonableness, e.g., *United States* v. *Rabinowitz,* 339 U.S. 56 (1950), the Court has never sustained the warrantless search of a dwelling not incident to arrest unless validated by consent. And, at least since 1950, the Court's decisions have made clear that a warrantless search is *eo ipso* unreasonable and unconstitutional, e.g., *United States* v. *Jeffers,* 342 U.S. 48 (1951); *Chapman* v. *United States,* 365 U.S. 610 (1961), unless "'. . . brought . . . within one of the exceptions to the rule that a search must rest upon a search warrant.'" *Stoner* v. *California,* 376 U.S. 483, 486 (1964), quoting *Rios* v. *United States,* 364 U.S. 253, 261 (1960). See also *Jones* v. *United States,* 357 U.S. 493 (1958). Those exceptions are specific. There are special rules relating to search of moving vehicles, stemming from *Carroll* v. *United States,* 267 U.S. 132 (1925), not involved here. There is the doctrine allowing search incident to a valid arrest, *United States* v. *Rabinowitz, supra,* which cannot validate the present search. *Preston* v. *United States,* 376 U.S. 364 (1964). Cases involving "abandoned property," see *Abel* v. *United States,* 362 U.S. 217 (1960), fall outside the scope of "persons, houses, papers, and effects" in which the Fourth Amendment guarantees the citizen against unreasonable search and seizure. See *Hester* v. *United States,* 265 U.S. 57 (1924). But petitioner's home and clothing are clearly within the protection of the Amendment and, inside that sphere, the Court's decisions allow only the exceptions enumerated above to the warrant requirement. Dictum in a few cases also suggests that a warrant may be foregone if compelling necessity to seize easily transported or destroyed contraband or instruments of crime makes resort to a magistrate impossible. *Johnson* v. *United States,* 333 U.S. 10 (1948); *Chapman* v. *United States, supra.* But no such necessity has been found by any of the courts below; nor could it have been on this record. Hence, absent consent, the search and seizure here were unconstitutional.

However, even were the question under the Fourth Amendment one—as the district court believed—of general reasonableness, fairness and unoppressiveness, it would be difficult to imagine a more unreasonable, unfair and oppressive search. Having petitioner in their custody and seeking items of his clothing to incriminate him, the police did not ask his permission to seize them. Instead, they detained him incommunicado, refused him leave to phone a lawyer or the persons at his home. Then, without a warrant, at 5:00 a.m., they went to petitioner's dwelling and intruded on his mother for the second time that night. Uniformed, and without explaining that she had a right to refuse them entry, they asked permission to come in, which she—unknowing—granted.

rested the validity of the search solely upon its finding of consent. (C.A. 19, 23.)

A. *The search and seizure issues are important, requiring consideration by this Court on certiorari.*

The two issues thus presented—the requisites for valid waiver of the requirement of a search warrant, and the effect of waiver by one cotenant upon the Fourth-Fourteenth Amendment rights of another—clearly present "an important question of federal law which has not been, but should be, settled by this court." Supreme Court Rule 19(1)(b). The circuit courts are in conflict on both issues.

(1) No issue under the Fourth Amendment is more frequently litigated than the validity of consent to a warrantless search.[7] Nor is any issue more critical to the Amendment's effective protection, for where consent is found all of the scrupulous safeguards preserved by this Court's decisions as limitations upon official intrusion are nullified. Not only is no warrant required, but—the protection of the Amendment being deemed waived—searches

---

[7] In addition to the cases collected in the following pages, see, e.g., these recent federal circuit court decisions: *Mosco* v. *United States*, 301 F.2d 180 (9th Cir. 1962); *United States* v. *Smith*, 308 F.2d 657 (2d Cir. 1962); *Villano* v. *United States*, 310 F.2d 680 (10th Cir. 1962); *Frye* v. *United States*, 315 F.2d 491 (9th Cir. 1963); *Robinson* v. *United States*, 325 F.2d 880 (5th Cir. 1964); *Gatlin* v. *United States*, 326 F.2d 666 (D.C. Cir. 1963); *United States* v. *Horton*, 328 F.2d 132 (3d Cir. 1964); *United States* v. *Hilbrich*, 341 F.2d 555 (7th Cir. 1965). Litigation of the issue in the State courts is not less frequent, see e.g., the California cases collected in *Note*, 51 CALIF. L. REV. 1010 (1963); *State* v. *Hanna*, 150 Conn. 457, 191 A.2d 124 (1963); *State* v. *Scrotsky*, 39 N.J. 410, 189 A.2d 23 (1963); *Commonwealth* v. *Wright*, 411 Pa. 81, 190 A.2d 709 (1963); *Holt* v. *State*, 17 Wis.2d 468, 117 N.W.2d 626 (1962), and the importance of the question has made it the subject of much recent law review comment, e.g., *Comment*, 69 DICK. L. REV. 69 (1964); *Comment*, [1964] U. ILL. L. FORUM 653; *Note*, 113 U. PA. L. REV. 260 (1964); *Note*, [1964] WIS. L. REV. 119. For earlier state cases, see *Annot.*, 31 A.L.R.2d 1078 (1953).

and seizures may proceed without probable cause[8] and unfettered of any other constraint of reasonableness.[9] Little wonder that "consent" is the policeman's preferred authority to search; that in 1954 a federal circuit court remarked upon "this increasing practice of federal officers searching a home without a warrant on the theory of consent . . .";[10] that the response of more than one state police official following *Mapp* v. *Ohio*, 367 U.S. 643 (1961), was, in substance: "We are going to get consent to search forms similar to the ones used by the F.B.I." [11]

(2) Nothwithstanding frequent litigation, the decisions of the lower courts are in irresolvable conflict and confusion. All courts agree, of course, that consent must be "voluntary" to be effective. But, as the Ninth Circuit has recently said, "In other contexts the word voluntary might connote anything from enthusiastic action taken on one's own initiative, at one extreme, to grudging action just short of being compelled by what the law would regard as duress, at the other." *Martinez* v. *United States*, 333 F.2d 405, 407 (9th Cir. 1964). Far from giving meaning to the concept of voluntariness as respects consent to a warrantless search, the circuit courts of appeals have more or less explicitly declared the concept not susceptible of reasoned analysis. "Each case necessarily depends upon its own facts. The mere fact that a particular panel of this court may feel that another panel, in a prior decision, was mistaken in holding that a finding was 'clearly erroneous' is not a basis for convening the court in bank and overruling the prior decision." *United States* v. *Page*, 302

---

[8] See *Rios* v. *United States*, 364 U.S. 253 (1960).

[9] See, *e.g.*, *Davis* v. *United States*, 327 F.2d 301 (9th Cir. 1964).

[10] *United States* v. *Arrington*, 215 F.2d 630, 637 (7th Cir. 1954).

[11] See the Appendix to *Weinstein, Local Responsibility for Improvement of Search and Seizure Practices*, 34 ROCKY MT. L. REV. 150, 176, 177 (1962). For similar responses, see *id.* at 178-179.

F.2d 81, 86 (9th Cir. 1962), distinguishing *Channel* v. *United States*, 285 F.2d 217 (9th Cir. 1960). See also *Hart* v. *United States*, 316 F.2d 916, 920 (5th Cir. 1963); *United States* v. *Ziemer*, 291 F.2d 100, 103 (7th Cir. 1961); *Burge* v. *United States*, 332 F.2d 171, 173 (8th Cir. 1964); *Tatum* v. *United States*, 321 F.2d 219, 220 (9th Cir. 1963). Expectably, the result of thus calling consent a "question of fact," without attempting to formulate any general principles of law which tell the trier what facts he is to inquire about and what he is to do if he finds one set of facts rather than another, has been serious inter-circuit conflict.[12] In *United States* v. *Roberts*, 179 F. Supp. 478 (D.D.C. 1959), Judge Youngdahl found a mother's consent involuntary on facts virtually indentical with those of the present case. This sort of fortuitous result may be blinked away, under the prevailing lore of the circuit courts, by saying that two district judges took different views on the same question of fact. But when the cases are closely compared, it becomes apparent that what controlled the differing results were differing views on an unarticulated question of law: whether one who does not know and is not told that officers cannot make a search without a warrant should be held to waive the warrant requirement by agreeing to a request for leave to search. Judge Young-

---

[12] Compare *Pekar* v. *United States*, 315 F.2d 319 (5th Cir. 1963), with *United States* v. *Ziemer*, 291 F.2d 100 (7th Cir. 1961). Compare *Higgins* v. *United States*, 209 F.2d 819 (D.C. Cir. 1954), with *United States* v. *MacLeod*, 207 F.2d 853 (7th Cir. 1953). Compare *Reed* v. *Rhay*, 323 F.2d 498 (9th Cir. 1963), with *United States* v. *Evans*, 194 F. Supp. 90 (D.D.C. 1961). Compare *United States* v. *Haas*, 106 F. Supp. 295, 109 F. Supp. 433 (W.D. Pa. 1952), with *United States* v. *Minor*, 117 F. Supp. 697 (E.D. Okla. 1953). Underlying these inconsistent results are large inconsistencies of attitude. Compare the inhospitality toward a finding of consent by the Court of Appeals for the District of Columbia Circuit, e.g., *Judd* v. *United States*, 190 F.2d 649, 651-652 (D.C. Cir. 1951), with the hospitality toward such a finding by the Court of Appeals for the Ninth Circuit, e.g., *Martinez* v. *United States*, 333 F.2d 405, 407 (9th Cir. 1964).

dahl assumed that the answer to this question was negative;[13] District Judge Young below assumed that it was positive; the Court of Appeals below affirmed without discussing the question; and, indeed, the question has not been explicitly framed in any circuit court decision.[14] Surely this question is one which permits and rationally demands an answer in law; but until this Court grants review to frame and decide such subordinate questions underlying the issue of consent, circuit court decisions in cases involving life or death will continue to be made lawlessly.

This Court has not decided a case involving the voluntariness of consent to search and seizure in almost twenty years. The few decisions prior to that time do not squarely address the questions arising in case after case today.[15]

---

[13] In *Roberts*, defendant's mother had been told by the searching officers that they were not permitted to search without a warrant unless she consented. But Judge Youngdahl found: "It is difficult to believe that this particular woman understood the significance of what the officers told her; it is quite implausible to believe she was aware a search warrant was a prerequisite to a valid search." 179 F. Supp. at 479. Therefore, Judge Youngdahl found her consent ineffective. In the present case, Judge Young found consent by petitioner's mother effective on a record which makes clear that she did not know and was not told that a search warrant was a prerequisite to a valid search.

[14] In a number of cases where effective consent has been found, it appears the person consenting was told that, unless he consented, a search could not be made without a warrant. *United States* v. *Heine*, 149 F.2d 485 (2d Cir. 1945); *United States* v. *Rivera*, 321 F.2d 704 (2d Cir. 1963); *United States* v. *MacLeod*, 207 F.2d 853 (7th Cir. 1953); *Burge* v. *United States*, 332 F.2d 171 (8th Cir. 1964); *United States* v. *Haas*, 106 F. Supp. 295, 109 F. Supp. 443 (W.D. Pa. 1952). But consent has also been found where no such warning was given, e.g., *McDonald* v. *United States*, 307 F.2d 272 (10th Cir. 1962) (alternative ground), and petitioner has found no circuit decisions squarely facing the question.

[15] *Gouled* v. *United States*, 255 U.S. 298 (1921), where consent was procured by misrepresentation, and *Johnson* v. *United States*, 333 U.S. 10 (1948), where entry "was granted in submission to authority," *id.* at 13, have been viewed as extreme cases. *United States* v. *Mitchell*, 322 U.S. 65 (1944), considers only the effect of the *McNabb* rule on consent to search. *McDonald* v. *United States*, 335 U.S. 451 (1948), does not distinctly address the question of voluntariness of consent. The *Amos* case is discussed at p. 31, *infra*.

Worse still, the Court's most extended discussion of the consent principle came in the "public documents" cases, *Davis* v. *United States*, 328 U.S. 582 (1946), and *Zap* v. *United States*, 328 U.S. 624 (1946); and notwithstanding the admonition that "Where officers seek to inspect public documents at the place of business where they are required to be kept, permissible limits of persuasion are not so narrow as where private papers are sought," [16] the courts of appeals have relied on *Davis* and *Zap* in sustaining searches for entirely private items.[17] The circuit court below thus erroneously relied on *Davis*. (C.A. 20.) Petitioner respectfully submits the question is ripe for renewed consideration by the Court.

(3) Similarly, the question under what circumstances, if any, consent to search given by one cotenant can affect the Fourth Amendment rights of another, urgently demands the attention of the Court. Frequently arising in cases where, as here, the voluntariness of the consent is also in issue,[18] the point is one upon which the "federal court decisions . . . are not in accord." *Commonwealth* v. *Wright*, 411 Pa. 81, 85, 190 A.2d 709, 711 (1963).[19] The Eighth Circuit itself, in an opinion upon which the decision below relies, has admitted that "Without the benefit of a Supreme Court clarification of the issue, those federal

---

[16] *Davis* v. *United States*, *supra*, 328 U.S. at 593.

[17] See, e.g., *Rees* v. *Peyton*, 341 F.2d 859 (4th Cir. 1965), relying on *Zap*.

[18] See, e.g., *United States* v. *Sferas*, 210 F.2d 69 (7th Cir. 1954); *Waldron* v. *United States*, 219 F.2d 37 (D.C. Cir. 1955); *Williams* v. *United States*, 263 F.2d 487 (D.C. Cir. 1959); *Davis* v. *United States*, 327 F.2d 301 (9th Cir. 1964); *United States* v. *Goodman*, 190 F. Supp. 847 (N.D. Ill. 1961); *United States* v. *Block*, 202 F. Supp. 705 (S.D.N.Y. 1962); *United States ex rel. McKenna* v. *Myers*, 232 F. 65 (E.D. Pa. 1964).

[19] *Wright* itself is not in accord with *United States ex rel. Stacey* v. *Pate*, 324 F.2d 934 (7th Cir. 1963), decided six months later.

courts which have considered the question have taken divergent positions." *Roberts* v. *United States,* 332 F.2d 892, 895 (8th Cir. 1964).[20] Early decisions held that the cotenant's consent could not validate a warrantless search against complaint by a person having a possessory interest in the premises searched.[21] Most of the subsequent cases appearing to give effect to such consent can be explained on various narrow grounds. Where the consenting and complaining parties were co-conspirators as well as cotenants and consent was given for the purpose of beguiling the searching officers, the result rested simply on the ordinary concepts of agency applicable among conspirators.[22] In a number of cases, the complaining party had no possessory interest whatever in the place searched; if given standing to complain at all,[23] it was as a means for vindicating by the exclusionary sanction the rights of the possessor;[24] and a finding of consent by the possessor ended the complaining party's grievance, which had never been bottomed on infringement of his own protected in-

---

[20] The Eighth Circuit had earlier reserved the question. *Foster* v. *United States,* 281 F.2d 310 (8th Cir. 1960).

[21] *Cofer* v. *United States,* 37 F.2d 677 (5th Cir. 1930) (alternative ground); *United States* v. *Rykowski,* 267 Fed. 866 (S.D. Ohio 1920) (alternative ground); *United States* v. *Ruffner,* 51 F.2d 579 (D. Md. 1931).

[22] See *United States* v. *Pugliese,* 153 F.2d 497 (2d Cir. 1945) (alternative ground); *United States* v. *Sferas,* 210 F.2d 69 (7th Cir. 1954); *United States* v. *Sergio,* 21 F. Supp. 553 (E.D.N.Y. 1937).

[23] In some of the cases in which the courts advert to consent by a party other than the one complaining of a search, the opinions make relatively clear that they are doing so for the purpose of stressing that the consenting party, but not the complaining party, had the sort of interest in the searched premises which the Fourth Amendment protects. See *United States* v. *Walker,* 190 F.2d 481 (2d Cir. 1951), 197 F.2d 287 (2d Cir. 1952); *Calhoun* v. *United States,* 172 F.2d 457 (5th Cir. 1949); *United States ex rel. Puntari* v. *Maroney,* 220 F. Supp. 801 (W.D. Pa. 1963).

[24] See *McDonald* v. *United States,* 335 U.S. 451 (1948).

terests.[25] Cases involving searches and seizures of movables upon consent of the person to whom their owner had entrusted them stand on different principles: warrantless searches of movables being lawful if based upon probable cause,[26] consent in such cases is pertinent only because the information conveyed in the consenting party's communication to the police gives the police reasonable ground to believe items subject to seizure are concealed within the movable.[27] Yet in a few recent decisions, among which petitioner's is the most extreme, courts have thought to find within these earlier cases a general principle which the cases will not support, that one cotenant in a dwelling may effectively waive another's constitutional immunity against warrantless search.[28]

---

[25] *Woodard* v. *United States*, 254 F.2d 312 (D.C. Cir. 1958) (complaining party is transient guest in consenting party's dwelling); *Fredricksen* v. *United States*, 266 F.2d 463 (D.C. Cir. 1959) (same); *Rees* v. *Peyton*, 341 F.2d 859 (4th Cir. 1965) (same); *Calhoun* v. *United States*, 172 F.2d 457 (5th Cir. 1949) (same); *Burge* v. *United States*, 342 F.2d 408 (9th Cir. 1965) (same). See also *Cutting* v. *United States*, 169 F.2d 951 (9th Cir. 1948); *Von Eichelberger* v. *United States*, 252 F.2d 184 (9th Cir. 1958); *Wion* v. *United States*, 325 F.2d 420 (10th Cir. 1963). The principle is apparent in cases sustaining against an absentee landlord's complaint searches consented to by his tenant in possession. See *Driskill* v. *United States*, 281 Fed. 146 (9th Cir. 1922); *Reszutek* v. *United States*, 147 F.2d 142 (2d Cir. 1945); *Fisher* v. *United States*, 324 F.2d 775 (8th Cir. 1963).

[26] *Carroll* v. *United States*, 267 U.S. 132 (1925); *United States* v. *Boston*, 330 F.2d 937 (2d Cir. 1964) (alternative ground); *Romero* v. *United States*, 318 F.2d 530 (5th Cir. 1963) (alternative ground); *United States* v. *Zimmerman*, 326 F.2d 1 (7th Cir. 1963).

[27] *Compare Sartain* v. *United States*, 303 F.2d 859 (9th Cir. 1962), with *Holzhey* v. *United States*, 223 F.2d 823 (5th Cir. 1955), where the movable was within a dwelling and consent of a cotenant was held ineffective. See also *United States* v. *Eldridge*, 302 F.2d 463 (4th Cir. 1962). Cases involving entry into a dwelling, upon consent of one cotenant, to arrest another, have been thought to involve the same principle, since arrest may be made on probable cause without a warrant. See *Teasley* v. *United States*, 292 F.2d 460 (9th Cir. 1961).

[28] *Roberts* v. *United States*, 332 F.2d 892 (8th Cir. 1964); *Davis* v. *United States*, 327 F.2d 301 (9th Cir. 1964); *United States ex rel. McKenna* v. *Myers*, 232 F. Supp. 65 (E.D. Pa. 1964). These cases, like the

No such broad doctrine is sanctioned by this Court's decisions. But neither has the Court condemned unequivocally a finding that one cotenant's Fourth Amendment rights may be waived by another. The question was reserved in *Amos* v. *United States,* 255 U.S. 313 (1921), and has not since been considered by the Court. Cases holding that a landlord may not effectively consent to search of his tenant's premises, see *Lustig* v. *United States,* 338 U.S. 74 (1949); *United States* v. *Jeffers,* 342 U.S. 48 (1951); *Chapman* v. *United States,* 365 U.S. 610 (1961), were thought distinguishable by the courts below, which read the Court's recent statement in *Stoner* v. *California,* 376 U.S. 483, 488 (1964), that "the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority,'" as limited to such cases. The issue is squarely presented in the present case, and demands decision by this Court.

B. *The decision below is wrong and sends petitioner to death in violation of his Fourth-Fourteenth Amendment rights.*

(1) Judged by appropriate standards, the consent to search given by petitioner's mother was not voluntary and understanding. While this Court has never had occasion to confront the question squarely, its opinion in *John-*

---

decision below (see C.A. 20) purport to rest upon the cases cited in notes 17-22 *supra.* The *Roberts* holding, however, did not involve a seizure of the complaining party's personal effects, and in *Davis* the trial court found that the purpose of the officers making entry was to talk to the occupant, not to search. *McKenna* is quite similar to the instant case.

In *Stein* v. *United States,* 166 F.2d 851 (9th Cir. 1948), it was indeed held that a commonlaw wife could validate by her consent the search of the dwelling which she shared with her husband. *Waldron* v. *United States,* 219 F.2d 37 (D.C. Cir. 1955) (alternative ground), is to the contrary, unless the cases are reconcilable on the ground that the husband in *Stein* had closed up the house and moved out prior to the search.

son v. *United States*, 333 U.S. 10, 13 (1948), plainly takes the view that in order to be effective a consent to search or seizure must be "an understanding and intentional waiver of a constitutional right." This is the concept of waiver ordinarily applicable to fundamental guarantees. See *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). It is not enough that the individual acquiesces in a method of procedure against which the Constitution gives protection; he or she must know of the protection which the Constitution gives and intentionally abandon or relinquish it. On the present record it is uncontested that petitioner's mother neither knew nor was told that the officers needed a warrant to conduct a lawful search. For this reason alone, her consent was ineffective. The point is the stronger because, one hour before she allowed the incriminating search, she had seen a police officer who arrested her son without a warrant compel him to put on clothes which he did not choose to wear. Nothing in the subsequent conduct of the officers dispelled the implication that their power to seize items of clothing without a warrant was limitless.

Other considerations too compel the conclusion that this consent failed to meet constitutional standards for waiver. The test of voluntariness of a consent to search and seizure should be more stringent than that for voluntariness of a confession, for while it is plain that some questioning is essential to police investigation, only the convenience of police officers requires procurement of consent to search in lieu of a warrant. There is legal process consistent with the Fourth Amendment for attaining the officer's end, but he chooses not to use it. Here, it was more convenient to the Hot Springs police to disturb a Negro woman at 5:00 a.m. than to disturb a magistrate. Following one hour after arrest of her son in their home—a circumstance

calculated to distract her, and which Captain Crain observed had in fact distracted her—two white, uniformed officers asked admittance for the purpose of a warrantless search and it was granted. These conditions constitute the sort of "implied coercion" found in *Amos* v. *United States*, 255 U.S. 313, 317 (1921),[29]—coercion to be condemned becaused of its almost inevitable tendency to produce an undeliberated and cowed consent. See *Elmore* v. *Commonwealth*, 282 Ky. 443, 138 S.W.2d 956 (1940), relied on by Judge Ridge in his dissent below. Where such conditions are found, judicial speculation that petitioner's mother did not succumb to their overbearing force is altogether impermissible.

(2) Even assuming the mother's consent voluntary and understanding, it could not effectively waive petitioner's constitutional rights. The officers went to petitioner's home for the specific purpose of seizing items of clothing which would incriminate *him*. He was available to them; they had him in custody at the time. But no effort was made, after due warning of his constitutional rights, to ask *his* permission for the search. Whatever may be the case when the individual at whom a search is aimed cannot be found by the police, only callous disregard for the Fourth Amendment can justify allowing the police to bypass a man whom they hold confined and seek a waiver of his rights at the hands of another. "It is important to bear

---

[29] The facts in *Amos* upon which this Court found consent ineffective were as follows: "Coleman and Rector . . . as deputy collectors of Internal Revenue . . . went to defendant's home and, not finding him there, but finding a woman who said she was his wife, told her they were revenue officers and had come to search the premises 'for violations of the revenue law'; . . . thereupon the woman opened the store and the [officers] . . . entered, and in a barrel of peas found a bottle containing not quite a half-pint of illicitly distilled whiskey . . .; and . . . they then went into the home of the defendant and on searching found two bottles under the quilt on the bed, one of which contained a full quart, and the other a little over a quart of illicitly distilled whiskey." 255 U.S. at 315.

in mind that it was the petitioner's constitutional right which was at stake here . . ." *Stoner* v. *California*, 376 U.S. 483, 487 (1964). And it would be callousness compounded to allow such bypassing where, as here, the police are detaining their prisoner incommunicado, preventing him, in flagrant violation of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), from calling upon a lawyer for his protection or from phoning the very persons at home whose consent to search the police are then actively seeking.

Moreover, any rule which would permit one cotenant, without actual authority from another, to waive the latter's Fourth Amendment rights ignores the intimate relationship between the Fourth and Fifth Amendments which this Court has long remarked. *Boyd* v. *United States*, 116 U.S. 616, 633-635 (1886); see *Mapp* v. *Ohio*, 367 U.S. 643, 657 (1961). Whatever its modern extensions, the Fourth Amendment has at its core a prohibition of warrantless official entries designed to secure incriminating evidence against a criminal suspect. *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (C.P. 1765); *Frank* v. *Maryland*, 359 U.S. 360, 365 (1959). Entries of this sort are dissimilar to other entries, both by reason of their practical consequences and because the historical experience embodied in the Fourth Amendment has singled them out as a source of especial concern. See *United States* v. *Blok*, 188 F.2d 1019 (D.C. Cir. 1951). And so it does not follow that, because petitioner's mother might have admitted a friend, relative or the exterminator to petitioner's bedroom closet, she could consistently with the Fourth Amendment admit a policeman in quest for evidence of petitioner's guilt. Of actual authority to permit this incriminating search, petitioner's mother had none. Petitioner believes this Court spoke generally, and not with reference only to the landlord-tenant relationship, when it said in *Stoner*

v. *California, supra*: "Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'" 376 U.S. at 488. Nothing more than an unrealistic finding of apparent authority supports the death sentence on this record.

II.

Certiorari should be granted to determine whether Arkansas' death penalty for rape is unconstitutional because (A) an unrebutted prima facie showing has been made of its racial application, in violation of the equal protection clause of the Fourteenth Amendment, or (B) its allowance to the jury of unfettered discretion to impose capital punishment for all offenses of rape, in the absence of aggravating circumstances, permits cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

A. *Petitioner's Equal Protection contention, wrongly rejected below presents an important question for consideration by this Court on certiorari.*

Seventeen American States retain capital punishment for rape. Nevada permits imposition of the penalty only if the offense is committed with extreme violence and great bodily injury to the victim;[30] the remaining sixteen jurisdictions—which allow their juries absolute discretion to punish any rape with death—are all southern or border states.[31] The federal jurisdiction and the District of Colum-

---

[30] Nev. Rev. Stat. §200.360 (1963). See also §200.400 (aggravated assault with intent to rape).

[31] The following sections punish rape or carnal knowledge unless otherwise specified. Ala. Code §§14-395, 14-397, 14-398 (Recomp. Vol. 1958); Ark. Stat. Ann. §§41-3403, 43-2153 (1964 Repl. Vols.); see also §41-3405 (administering potion with intent to rape); §41-3411 (forcing marriage); Fla. Stat. Ann. §794.01 (1964 Cum. Supp.); Ga. Code Ann. §§26-1302,

bia, with its own strong southern traditions, also allow the death penalty for rape.[32]

Between 1930 and 1962, the year in which petitioner was sentenced to die, 446 persons were executed for rape in the United States. Of these, 399 were Negroes, 45 were whites, and 2 were Indians. All were executed in Southern or border States or the District. The percentages—89.5% Negro, 10.1% white—are revealing when compared to similar racial percentages of persons executed during the same years for murder and other capital offenses. Of the total number of persons executed in the United States, 1930-1962, for murder, 49.1% were Negro; 49.7% were white. For other capital offenses, 45.6% were Negro; 54.4% were white. Louisiana, Mississippi, Oklahoma, Virginia, West Virginia and the District of Columbia never executed a white man for rape during these years. Together they executed 66 Negroes. Arkansas, Delaware, Florida, Kentucky and Missouri each executed one white man for rape between 1930 and 1962. Together they executed 71 Negroes. Putting aside Texas (which executed 13 whites and 66 Negroes), sixteen Southern and border States and the District of Columbia between 1930 and 1962 executed 30 whites and 333 Negroes for rape: a ratio

---

26-1304 (1963 Cum. Supp.); Ky. Rev. Stat. Ann. §435.090 (1963); La. Rev. Stat. Ann. §14:42 (1950) (called aggravated rape but slight force is sufficient to constitute offense; also includes carnal knowledge); Md. Ann. Code, art. 27, §§461, 462 (1957); see also art. 27, §12 (assault with intent to rape); Miss. Code Ann. §2358 (Recomp. Vol. 1956); Vernon's Mo. Stat. Ann. §559.260 (1953); N.C. Gen. Stat. §14-21 (Recomp. Vol. 1953); Okla. Stat. Ann., tit. 21, §§1111, 1114, 1115 (1958); S.C. Code Ann. §§16-72, 16-80 (1962) (includes assault with attempt to rape as well as rape and carnal knowledge); Tenn. Code Ann. §§39-3702, 39-3703, 39-3704, 39-3705 (1955); Tex. Pen. Code Ann., arts. 1183, 1189 (1961); Va. Code Ann. §18.1-44 (Repl. Vol. 1960); see also §18.1-16 (attempted rape).

[32] 18 U.S.C. §2031 (1964); 10 U.S.C. §920 (1964); D.C. Code Ann. §22-2801 (1961).

of better than one to eleven. Clearly, unless the incidence of rape by Negroes is many times that of rape by whites, capital punishment for rape survives in the twentieth century principally as an instrument of racial repression.[33]

---

[33] The figures in this paragraph are taken from UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, No. 32; *Executions, 1962* (April 1963). Table 1 thereof shows the following executions under civil authority in the United States between 1930 and 1962:

MURDER

	Total	*White*	*Negro*	*Other*
Number	3298	1640	1619	39
Per Cent	100.0	49.7	49.1	1.2

RAPE

	Total	*White*	*Negro*	*Other*
Number	446	45	399	2
Per Cent	100.0	10.1	89.5	.04

OTHER OFFENSES

	Total	*White*	*Negro*	*Other*
Number	68	37	31	0
Per Cent	100.0	54.4	45.6	0.0

Table 2 thereof shows the following executions under civil authority in the United States between 1930 and 1962, for the offense of rape, by State:

	White	Negro	Other
Federal	2	0	0
Alabama	2	20	0
Arkansas	1	17	0
Delaware	1	3	0
District of Columbia	0	2	0
Florida	1	35	0
Georgia	3	58	0
Kentucky	1	9	0
Louisiana	0	17	0
Maryland	6	18	0
Mississippi	0	21	0
Missouri	1	7	0
North Carolina	4	41	2
Oklahoma	0	4	0
South Carolina	5	37	0
Tennessee	5	22	0
Texas	13	66	0
Virginia	0	21	0
West Virginia	0	1	0
	45	399	2

If this be so—if the racially unequal results in these States derive from any cause which takes account of race as a factor in meting out punishment—a Negro punished by death is denied, in the most radical sense, the equal protection of the laws.[34] One of the cardinal purposes of the Fourteenth Amendment was the elimination of racially discriminatory criminal sentencing. The First Civil Rights Act of April 9, 1866, ch. 31, §1, 14 Stat. 27, declared the Negroes citizens of the United States and guaranteed that "such citizens, of every race and color, . . . shall be subject to like punishment, pains, and penalties [as white citizens], and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." The Fourteenth Amendment was designed to elevate the Civil Rights Act of 1866 to constitutional stature. See, e.g., *tenBroek, Thirteenth Amendment to the Constitution of the United States*, 39 CALIF. L. REV. 171 (1951); *Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 STAN. L. REV. 5 (1949). The Enforcement Act of May 31, 1870, ch. 114, §§16, 18, 16 Stat. 140, 144, implemented the Amendment by reenacting the 1866 act and extending its protection to all persons. This explicit statutory prohibition of racially discriminatory sen-

[34] The contention that racially discriminatory application of the death penalty in rape cases denies equal protection has been raised in a number of cases now pending in state and federal courts. See, e.g., *Mitchell* v. *Stephens*, 232 F. Supp. 497, 507 (E.D. Ark. 1964), appeal pending; *Moorer* v. *MacDougall*, U.S. Dist. Ct., E.D.S.C., No. AC-1583, petition for writ of habeas corpus pending; *Aaron* v. *Holman*, U.S. Dist. Ct., M.D. Ala., C.A. No. 2170-N, proceedings on petition for writ of habeas corpus stayed pending exhaustion of state remedies July 2, 1965; *Swain* v. *Alabama*, Ala. Sup. Ct., 7 Div. No. 699, petition for leave to file petition for writ of error *coram nobis* denied June 25, 1965; *Alabama* v. *Billingsley*, Cir. Ct. Etowah County, No. 1159, motion for new trial and motion for reduction of sentence pending; *Craig* v. *Florida*, Sup. Ct. Fla., No. 34,101, appeal from denial of motion for reduction of sentence pending; *Louisiana ex rel. Scott* v. *Hanchey*, 20th Jud. Dist. Ct., Parish of West Feliciana, petition for habeas corpus pending.

tencing survives today as Rev. Stat. §1977 (1875), 42 U.S.C. §1981 (1964).

For purposes of the prohibition, it is of course immaterial whether a State writes on the face of its statute books: "Rape shall be punishable by imprisonment . . ., except that rape by a Negro of a white woman, or any other aggravated and atrocious rape, shall be punishable by death by electrocution," or whether the State's juries read a facially color-blind statute to draw the same racial line. Discriminatory application of a statute fair upon its face is more difficult to prove, but no less violates the State's obligation to afford all persons within its jurisdiction the equal protection of the laws. E.g., *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951) (alternative ground); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Hamilton* v. *Alabama*, 376 U.S. 650 (1964) (per curiam).[35] And it does not matter that the discrimination is worked by a number of separate juries functioning independently of each other, rather than by a single state official. However it may divide responsibility internally, the *State* is federally obligated to assure the equal application of its laws.[36] This Court has long sustained claims of discriminatory jury exclusion

---

[35] It is also immaterial whether a State imposes different penalties for classes of cases defined in terms of race, or whether it imposes a penalty of death in all cases of a given crime, subject to the option of the jury in some racially defined sub-class of the cases. The Fourteenth Amendment's obligation of equality extends not only to those "rights" which a State is federally compelled to give its citizens, but also to any benefits the State may choose to give any class of them, however gratuitously. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Watson* v. *City of Memphis*, 373 U.S. 526 (1963).

[36] Execution by the State of the death sentence which it has given juries discretion to impose clearly provides that "interplay of governmental and private action," *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 463 (1958), quoted in *Anderson* v. *Martin*, 375 U.S. 399, 403 (1964), which makes the State responsible for the discrimination. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

upon a showing of exclusion continuing during an extended period of years, without inquiry whether the same jury commissioners served throughout the period. E.g., *Neal* v. *Delaware*, 103 U.S. 370 (1881); *Bush* v. *Kentucky*, 107 U.S. 110 (1882); *Hernandez* v. *Texas*, 347 U.S. 475 (1954). Congress, when it enacted the 1866 Civil Rights Act knowing that "In some communities in the South a custom prevails by which different punishment is inflicted upon the blacks from that meted out to whites for the same offense,"[37] intended precisely by the Act, and subsequently by the Fourteenth Amendment, to disallow such "custom" as it operated through the sentences imposed by particular judges and juries.[38]

So the question on this record is one of proof: whether petitioner has made a sufficient showing of racially discriminatory capital sentencing under Arkansas' rape statutes. The court of appeals below held that he had not, and in so holding rested its decision upon two principles of sufficient generality and importance to merit this Court's review on certiorari. First, the court of appeals rejected without discussion petitioner's attempt to apply the "prima facie" evidence principle of the jury-exclusion cases to proof of sentencing discrimination. Stating that "the burden is on the one asserting discrimination" (C.A. 6), it declined to find that burden carried because: "The circumstances of each rape case have particular pertinency. We are given no information as to how many Negroes and how many whites, after investigation, were not charged" (C.A. 9). Second, it rejected petitioner's attempt to draw

---

[37] Cong. Globe, 39th Cong., 1st Sess. 1758 (4/4/1866) (remarks of Senator Trumbull, who introduced, reported and managed the bill which became the act).

[38] See the text of the act *supra*; see also, e.g., Cong. Globe, 39th Cong., 1st Sess. 475 (1/29/1866), 1759 (4/4/1866) (remarks of Senator Trumbull).

evidentiary support from the fifty-year history of administration of capital punishment for rape in Arkansas, on the ground that "The defense argument goes too far and would, if taken literally, make prosecution of a Negro impossible in Arkansas today because of the existence in the past of standards which are now questionable." (C.A. 9.) Together, these grounds make proof of discrimination in the application of the death penalty nigh impossible.

Petitioner does not seek to tangle the State of Arkansas in past sins. He seeks only a fair opportunity to demonstrate the obvious: that his present incarceration under sentence of death is the product of a long-continued and continuing system of discriminatory administration of justice, operating in every gap of discretion left by the State's written law, to deny him equal treatment and subject him to extreme punishment which in practice is virtually never applied to the white man, but is reserved as the ultimate weapon of terror to hold the Negro in his place. To show this, he relies on the past, and necessarily so. "Institutions, like other organisms, are predominantly what their past has made them. History provides the illuminating context within which the implications of present conduct may be known." *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, 69 (1961). It is unreasonable to seek to understand petitioner's death sentence in isolation from history—most pertinently, Arkansas' long-time practice of systematic jury exclusion, see, e.g., *Bailey* v. *Henslee,* 287 F.2d 936 (8th Cir. 1961); *Henslee* v. *Stewart,* 311 F.2d 691 (8th Cir. 1963), and Arkansas' fifty-year experience in the exercise of jury discretion to impose the death sentence for rape. This Court has looked far into the past in jury-exclusion cases, e.g., *Arnold* v. *North Carolina,* 376 U.S. 773 (1964), and by the nature of things proof of capital sentencing discrimina-

tion requires a still more extended canvass. For the death sentence is rarely imposed; it is a random scourge—albeit applied better than nine times to one against a Negro.

Petitioner asks this Court to consider whether he has not made a prima facie showing of discrimination, sufficient to throw some burden of explanation on the State. Because of the Fourteenth Amendment's overriding purpose to secure racial equality, "racial classifications [are] 'constitutionally suspect,' . . . and subject to the 'most rigid scrutiny.' . . ." *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964). This principle has as its corollary that a sufficient initial showing of unequal treatment of the races is made, calling State procedures in question, whenever it appears that the races are substantially disproportionately represented in groups of persons differently disposed of under those procedures: such a showing compels the inference that a State is drawing the racial line unless the State offers some justification in non-racial factors for the disproportion. E.g., *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Hernandez* v. *Texas*, 347 U.S. 475 (1954); *Reece* v. *Georgia*, 350 U.S. 85 (1955); *Eubanks* v. *Louisiana*, 356 U.S. 584 (1958); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *cf. Oyama* v. *California*, 332 U.S. 633 (1948). Here the disproportion is extreme: more than nine executed Negroes to one executed white over fifty years. The district court impermissibly circumscribed petitioner's proof by limiting to three counties his inquiry into the causes of the disproportion, but the evidence taken in the counties—treated by the district court as a "trial run" and apparently thought by the court of appeals not unrepresentative of the State (C.A. 18)—clearly negatived the possibility that the nine-and-a-half to one ratio was accounted for by differing numbers of rape convictions for the races. Three whites to two Negroes were charged, and an equal number of whites and Negroes convicted of rape.

This alone should suffice to make an initial showing of racial discrimination and throw the burden of explanation to the State. Of course it is true, as the court of appeals said, that the circumstances of each particular rape case are significant for sentencing. To determine with scientific precision the influence of the racial factor in capital sentencing, it would be desirable to gather data concerning, and to hold constant, other potential factors: the number of assailants and victims in a rape episode, the ages of the defendant and the prosecutrix, the character of each, the degree of force which the sentencing jury could find that the defendant employed, and the degree of resistance with which he was met, the extent of injury if any to the prosecutrix—in all, an innumerable host of details about the parties, the offense and the trial. Many of these matters cannot be shown with respect to past rape prosecutions. Many can, and with far more ease by the State than by the petitioner. Whatever the State can show in explanation should be permitted to be shown and then evaluated. The issue on the present record is whether the State has any obligation to show anything, or whether it may rest silent in the teeth of evidence that more than nine times the number of Negroes than whites convicted of rape are sentenced to death.

This Court should hold that the State may not rest on such a record. Several considerations support the holding.

First, the hypothesis of racial discrimination is particularly likely in view of the coincidence between the Arkansas figures and those of the other jurisdictions—all southern—which have executed persons for rape during the past thirty years. For all jurisdictions, the Negro-white ratio is nine to one—although for other crimes than rape it is about one to one. Studies and observations by students of the criminal process tend to support the hypothesis of

discrimination. E.g., *Bullock, Significance of the Racial Factor in the Length of Prison Sentences,* 52 J. CRIM. L., CRIM. & POL. SCI. 411 (1961); *Wolfgang, Kelly & Nolde, Comparison of the Executed and the Commuted among Admissions to Death Row,* 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962); *Hartung, Trends in the Use of Capital Punishment,* 284 ANNALS 8, 14-17 (1952); WEIHOFEN, THE URGE TO PUNISH 164-165 (1956).

Second, the broader picture of Arkansas life and law cannot be ignored. The State's resistance to the rights of Negro school children and to the law of the land at Little Rock, its pattern of excluding Negroes from its criminal juries, have a place in the estimate of probabilities. Arkansas still by statute forbids the intermarriage of whites with Negroes, ARK. STAT. ANN. §§55-104, 55-105 (1947), and punishes interracial cohabitation (called concubinage) as a felony, although intraracial cohabitation is a misdemeanor, ARK. STAT. ANN. §§41-805 to 41-810 (1964). The lesson it thus officially teaches its citizens respecting the abhorrence in which even voluntary interracial sexual relations should be held cannot help but have an impact on the views which a criminal jury will hold of an interracial rape. Cf. *Peterson* v. *City of Greenville,* 373 U.S. 244 (1963); *Lombard* v. *Louisiana,* 373 U.S. 267 (1963); *Robinson* v. *Florida,* 378 U.S. 153 (1964).[39]

Third, the absolute discretion which Arkansas law gives jurors to decide between life and death, undirected by any rational standards for making that decision, see part

[39] On the statute books of Arkansas still stand requirements of segregation in railroads (including waiting rooms), Ark. Stat. Ann. §73-1218 (1957), street cars, Ark. Stat. Ann. §73-1614 (1957), buses, Ark. Stat. Ann. §73-1747 (1957), schools, Ark. Stat. Ann. §80-509 (1960), penal institutions, Ark. Stat. Ann. §§46-144, 46-145 (1964), deaf and blind institutes for children, Ark. Stat. Ann. §80-2401 (1960), chain gangs, Ark. Stat. Ann. §76-1119 (1957), and any "establishment where gaming is legal," Ark. Stat. Ann. §84-2724 (1960).

III(B), *infra*, invites the influence of arbitrary and discriminatory considerations. This Court has long been concerned with a vagueness of criminal statutes which "licenses the jury to create its own standard in each case." *Herndon* v. *Lowry*, 301 U.S. 242, 263 (1937). See, e.g., *Smith* v. *Cahoon*, 283 U.S. 553 (1931); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926); *Winters* v. *New York*, 333 U.S. 507 (1948). The vice of such statutes is not alone their failure to give fair warning of prohibited conduct, but the breadth of room they leave for jury caprice and suasion by impermissible considerations, *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432-433 (1963); *Freedman* v. *Maryland*, 380 U.S. 51, 56 (1965); *Lewis, The Sit-In Cases: Great Expectations*, [1963] SUPREME COURT REVIEW 101, 110; Note, 109 U. PA. L. REV. 67, 90 (1960), including racial considerations, see *Louisiana* v. *United States*, 380 U.S. 145 (1965); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Cox* v. *Louisiana*, 379 U.S. 536 (1965). Unlimited sentencing discretion in a capital jury presents this vice in the extreme. To paraphrase *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 505 (1952): "Under such a standard the most careful and tolerant [lay juror] . . . would find it virtually impossible to avoid favoring one [race] . . . over another."

Petitioner requests the Court to grant certiorari, that it may review and reverse the judgment of the court of appeals, which cast an unwarranted and impossible burden upon petitioner in demonstrating that he had been denied equal treatment in the most grievous penalty known to law.

B. *The Court should grant certiorari to consider petitioner's contention that his sentence is unconstitutional under the Eighth and Fourteenth Amendments.*

The issue which three Justices of the Court thought deserving of certiorari in *Rudolph* v. *Alabama*, 375 U.S. 889 (1963), was deemed by the court of appeals below one which "must be for the Supreme Court in the first instance." P. 16, *supra*. The Fourth Circuit has taken the same view. *Ralph* v. *Pepersack*, 335 F.2d 141 (4th Cir. 1964). Petitioner respectfully requests the judgment of the Court on the issue.

The question is not, in this aspect, whether on any rational view which one might take of the purpose of criminal punishment, the defendant's conduct as the jury might have found it at its worst on this record could support a death sentence consistent with civilized standards for the administration of criminal law. As the issue of penalty was submitted to the jury in their unlimited discretion under Arkansas procedure,[40] their attention was directed to none of the purposes of criminal punishment, nor to any aspect or aspects of the defendant's conduct. They were not invited to consider the extent of physical harm to the prosecutrix, the moral heinousness of the defendants' acts, his susceptibility or lack of susceptibility to reformation, the extent of the deterrent effect of killing the defendant "*pour décourager les autres.*" Cf. *Packer, Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964). They were permitted to choose between life and death upon conviction for any reason, rational or irrational, or for no reason at all: at a whim, a vague caprice, or because of the color of petitioner's skin if that

---

[40] *Allison* v. *State*, 204 Ark. 609, 164 S.W.2d 442 (1942); *Rorie* v. *State*, 215 Ark. 282, 220 S.W.2d 421 (1949).

did not please them. In making the determination to impose the death sentence, they acted wilfully and unreviewably, without standards and without direction. Nothing assured that there would be the slightest thread of connection between the sentence they exacted and any reasonable justification for exacting it. Cf. *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942). A judgment so unconfined, so essentially erratic, is per se cruel and unusual because it is purposeless, lacking in any relationship by which its fitness to the offense, or to the offender or to any legitimate social purpose may be tested. It is cruel not only because it is extreme but because it is wanton; and unusual not only because it is rare, but because the decision to remove the defendant from the ordinary penological regime is arbitrary. To concede the complexity and interrelation of sentencing goals, see *Packer, supra*, is no reason to sustain a statute which ignores them all. It is futile to put forward justifications for a death so inflicted; there is no assurance that the infliction responds to the justification or will conform to it in operation. Inevitably under such a sentencing regime, capital punishment in those few, arbitrarily selected cases where it is applied both is " 'disproportioned to the offenses charged' " and constitutes " ' unnecessary cruelty.' " *Rudolph* v. *Alabama, supra*, 375 U.S. at 891.[41]

---

[41] The United States Department of Justice has taken the following position on continued imposition of the death penalty: "We favor the abolition of the death penalty. Modern penology with its correctional and rehabilitation skills affords greater protection to society than the death penalty which is inconsistent with its goals. This Nation is too great in its resources and too good in its purposes to engage in the light of present understanding in the deliberate taking of human life as either a punishment or a deterrent to domestic crime." Letter of Deputy Attorney General Ramsey Clark to the Honorable John L. McMillan, Chairman, District of Columbia Committee, House of Representatives, July 23, 1965, reported in *New York Times*, July 24, 1965, p. 1, col. 5.

III.

Certiorari should be granted to determine whether use of poll tax books containing racial designations, as required by statute, in the system of jury selection is constitutional.

This Court has long made clear that "Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race." *Cassell* v. *Texas*, 339 U.S. 282, 286. Petitioner contends that the jury selection procedures established by state law and used in Garland County, Arkansas, encourage and permit the selection of jurors on the basis of race, in violation of the Fourteenth Amendment.

In Garland County, petit jury lists are selected by a jury commission consisting of three commissioners who meet together periodically and draw up a list of names (Tr. 47, 64). They rely primarily on their knowledge of persons in the community (Tr. 61), but also use a telephone book (Tr. 60, 77) and a list of persons who have previously served (Tr. 55, 77). At the time of petitioner's trial, only qualified electors who had paid the poll tax were eligible to be jurors.[42] Thus the jury commissioners checked the poll tax books to determine whether the persons they had selected were qualified. In accordance with statute, Ark. Stat. Ann. §3-118 (1956), the poll tax books designated the race of all qualified electors (Tr. 57, 59).

In the recent case of *Hamm* v. *Virginia State Board of Elections*, 230 F. Supp. 156 (E.D.Va. 1964) aff'd sub nom. *Tancil* v. *Woolls*, 379 U.S. 19, a three-judge district court declared that Virginia statutes requiring that lists of

---

[42] In November, 1964, Arkansas approved a constitutional amendment outlawing the poll tax. Ark. Const., Amend. 51.

voters and taxpayers be kept in separate books according to race violated the Fourteenth Amendment. The district court stated that it was now

> axiomatic that no State can directly or casually promote a distinction in the treatment of persons solely on the basis of their color. To be within the condemnation, the governmental action need not effectuate segregation of facilities directly. *Cf. Anderson v. Martin*, 375 U.S. 399, 402, 84 S. Ct. 454, 11 L. Ed. 439 1964. The result of the statute or policy must not tend to separate individuals by reason of difference in race or color. No form of State discrimination, no matter how subtle, is permissible under the guarantees of the Fourteenth Amendment. 230 F. Supp. at 157-158.

One of the Virginia statutes struck down dealt specifically with poll tax lists.[43]

The court of appeals in this case, however, merely stated that the *Hamm* case "appears to cast some doubt on [the] validity" of racially designated poll tax books (C.A. 15). By refusing to give full weight to the three-judge court's decision and this Court's affirmance, the court of appeals was able, in a capital case, to avoid the full force of petitioner's constitutional claim. The court should have acknowledged that racially designated poll tax books are unconstitutional and should have examined Arkansas' jury selection procedures from this starting point. Its failure to do this, and the consequent need for clarification of the issue, is reason enough for this Court to grant certiorari.

The court of appeals tried to minimize the significance of the racially designated poll tax books on the ground that

[43] The Arkansas statute differs in that it does not call for separate books, but this distinction is without significance.

the jury commissioners drew up an independent list of jurors before consulting the poll tax book. But the fact that an independent list is drawn up first does not eliminate the many opportunities for discrimination created by the statutorily imposed system of racial designations.

A selection procedure which provides unnecessary opportunities for discrimination violates the Fourteenth Amendment. In *Avery* v. *Georgia,* 345 U.S. 559, a conviction was reversed because the names of potential jurymen were placed on different colored slips according to race. The trial judge testified that he selected the slips without regard to color, but Chief Justice Vinson stated that "Even if the white and yellow tickets were drawn from the jury box without discrimination, opportunity was available to resort to it at other stages in the selection process." *Id.* at 562. And Justice Frankfurter, concurring said: "We may accept the testimony of the judge who drew the slips from the box as to the honesty of his purpose; that testimony does not refute the fact that there were opportunities to discriminate, as experience tells us there will inevitably be when such differentiating slips were used. *Id.* at 564.

That a state must not provide unnecessary "opportunities to discriminate" is also shown by *Anderson* v. *Martin,* 375 U.S. 559, where this Court ended the Louisiana practice of designating the race of all candidates for public office. There was, of course, no positive proof that these racial designations in any way influenced the voting patterns of Louisiana citizens. Nonetheless, the Court held that the designations were unconstitutional because the state was indicating that race was "an important—perhaps paramount—consideration" in a voter's choice. *Id. at* 402. The Court added that a state cannot "encourage its citizens to vote for a candidate solely on account of

race. Cf. *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, 203, 89 L. Ed. 173, 183, 65 S. Ct. 226 (1944). And that which cannot be done by express statutory prohibition cannot be done by indirection." *Id.* at 404. In the jury situation it is clear that a state cannot encourage, or even permit, its jury commissioners to select juries on the basis of race. But the Arkansas procedure, "by indirection," both permits and encourages selection along racial lines.

The Court of Appeals, having held against petitioner on the merits, stated that it was "unnecessary to consider the argument [raised in the district court] that Maxwell waived any objections to the petit jury panel and did so within the permitted scope of *Fay* v. *Noia, supra,* 372 U.S. 438-40 (1963)." The district court had strongly suggested that petitioner waived his rights with respect to jury selection by failing to raise the issue in the state courts. It relied on the fact that the attorney who represented petitioner in the state courts was aware of petitioner's constitutional rights and familiar with the procedure for selecting jurors in Garland County. The district court also noted the trial attorney's testimony that he had "discussed the jury panel" with petitioner. It apparently interpreted this testimony as meaning that the attorney had discussed with Maxwell the jury selection procedures used in Arkansas. A more plausible interpretation is that the attorney merely talked with petitioner about the desirability of certain jurors. There was no explicit evidence that the attorney discussed with petitioner the question of raising or not raising a challenge to the method of jury selection by motion to quash, and, in fact, the attorney testified that he never gave petitioner this choice (Tr. 297-298, 305-306). There is no evidence that petitioner knew or understood the nature of the right involved or the particular practices of the jury commission attacked here.

Waiver of a constitutional right is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst,* 304 U.S. 458, 464. In *Fay* v. *Noia,* 372 U.S. 391, this Court declared that "the doctrine of fictitious waiver is unacceptable." The strict standards required by the courts before finding waiver of the constitutional right to a jury chosen without discrimination on account of race are set forth in a line of Fifth Circuit cases. *United States ex rel. Goldsby* v. *Harpole,* 263 F.2d 71 (5th Cir. 1959), cert. denied, 361 U.S. 838; *United States ex rel. Seals* v. *Wiman,* 304 F.2d 53 (5th Cir. 1962), cert. denied 372 U.S. 924; *Whitus* v. *Balkcom,* 333 F.2d 496 (5th Cir. 1964), cert denied, 379 U.S. 93; *Cobb* v. *Balkcom,* 339 F.2d 95 (5th Cir. 1964). In *Goldsby* and *Seals,* as in the case of petitioner, "the important fact . . . was that the attorney for the Negro defendant did not consult his client with regard to his decision to refrain from making attacks on the jury system." *Whitus, supra,* 333 F.2d at 502. Thus the fact that trial counsel did not raise the issue with respect to county jury selection methods can in no way prejudice petitioner, for petitioner was never actually consulted concerning the attorney's failure to raise the issue.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
LEROY D. CLARK
FRANK H. HEFFRON
10 Columbus Circle
New York, New York 10019

GEORGE HOWARD, JR.
329½ Main Street
Pine Bluff, Arkansas

HAROLD B. ANDERSON
205 Century Building
Little Rock, Arkansas

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pennsylvania

Attorneys for Petitioner

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 9 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 429

WILLIAM L. MAXWELL,

Petitioner,

v.

DAN D. STEPHENS, Superintendent of Arkansas State Penitentiary.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

GEORGE HOWARD, JR.
329½ Main Street
Pine Bluff, Arkansas

HAROLD B. ANDERSON
205 Century Building
Little Rock, Arkansas

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
LEROY D. CLARK
FRANK H. HEFFRON
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pennsylvania

Attorneys for Petitioner

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,729

September Term, 1964

WILLIAM L. MAXWELL,

Appellant,

vs.

DAN D. STEPHENS, Superintendent of Arkansas State Penitentiary.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

Judgment of Court of Appeals

This cause came on to be heard on the original files of the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court entered May 6th, 1964 in this cause, denying petition for writ of habeas corpus be, and the same is hereby, affirmed, in accordance with majority opinion of this Court this day filed herein.

June 30, 1965.

Order entered in accordance
with majority opinion:—

ROBERT C. TUCKER
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,729

WILLIAM L. MAXWELL,

Appellant,

v.

DAN D. STEPHENS, Superintendent of Arkansas State Penitentiary,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

[June 30, 1965.]

Before MATTHES, BLACKMUN, and RIDGE, Circuit Judges.

BLACKMUN, Circuit Judge.

William L. Maxwell, a Negro possessing an eighth grade education, stands convicted by a jury in the Circuit Court of Garland County, Arkansas, of the crime of rape, as defined by § 41-3401, Arkansas Statutes 1947. The offense was committed on November 3, 1961. Maxwell at the time was 21 years of age. The jury did not "render a verdict

of life imprisonment in the State penitentiary at hard labor", as it had the right to do under §§ 43-2153 and 41-3403, and for which it had been given an alternate verdict form. As a consequence, and in line with the interpretation consistently given § 43-2153 by the Supreme Court of Arkansas,[1] the death sentence was imposed. On appeal the conviction was affirmed. *Maxwell* v. *State*, 236 Ark. 694, 370 S.W.2d 113 (1963).[2]

Four days before the execution date which was fixed following that unsuccessful appeal Maxwell filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Arkansas. Judge Young conducted a hearing on the federal constitutional issues raised by that petition. Briefs were filed. The court wrote a detailed opinion denying the relief requested, *Maxwell* v. *Stephens*, 229 F.Supp. 205 (E.D. Ark. 1964), but then granted Maxwell's petition for a certificate of probable cause, as contemplated by 28 U.S.C. § 2253, and further stayed execution.

Except for an early period prior to the state trial when court appointed attorneys were in the case, Maxwell has been represented through all the state and federal proceedings by competent, although different, non-court-appointed counsel.

---

[1] *Kelley* v. *State*, 133 Ark. 261, 202 S.W. 49, 54 (1918); *Bullen* v. *State*, 156 Ark. 148, 245 S.W. 493, 494 (1922); *Clark* v. *State*, 169 Ark. 717, 276 S.W. 849, 853-54 (1925); *Smith* v. *State*, 205 Ark. 1075, 172 S.W.2d 248, 249 (1943); *Turner* v. *State*, 224 Ark. 505, 275 S.W.2d 24, 31 (1955); *Stewart* v. *State*, 233 Ark. 458, 345 S.W.2d 472, 475 (1961), cert. denied 368 U.S. 935.

[2] No petition for certiorari was filed with the Supreme Court of the United States. This of course no longer constitutes a failure to exhaust available state remedies. *Fay* v. *Noia*, 372 U.S. 391, 435-38 (1963); *Curtis* v. *Boeger*, 331 F.2d 675 (8 Cir. 1964).

We note, as we have noted before in other cases of this type,[3] that Maxwell's guilt or innocence is not in issue before us. This is still another situation where, as the United States Supreme Court described the posture of an earlier Arkansas case, " . . . what we have to deal with is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved". *Moore* v. *Dempsey*, 261 U.S. 86, 87-88 (1923).

The circumstances and details of the crime are, as usual, sordid. They are set forth in the Arkansas opinion, pp. 114-16 of 370 S.W.2d, and need not be repeated here. It suffices only to say that the victim was a white woman, 35 years old, who lived with her helpless ninety-year-old father; that their home was entered in the early morning by the assailant's cutting or breaking a window screen; that in the ensuing struggle the victim bit her assailant and caused bleeding; and that she was assaulted and bruised, her father injured, and the lives of both threatened. Confessions taken from Maxwell were not employed at the trial. The defense presented no evidence. The jury was out several hours. No question is raised as to the sufficiency of the evidence.

On this habeas corpus appeal Maxwell presses three issues:[4] (1) he was denied due process of law and the

---

[3] *Bailey* v. *Henslee*, 287 F.2d 936, 939 (8 Cir. 1961), cert. denied 368 U.S. 877; *Henslee* v. *Stewart*, 311 F.2d 691, 692 (8 Cir. 1963), cert. denied 373 U.S. 902.

[4] Other issues urged in the district court, see pp. 208-09 and 211-12 of 229 F.Supp., but abandoned on this appeal, were the legality of Maxwell's arrest, the denial of a motion for change of venue, the validity of confessions taken from him, and the legality of a search of his person and of the clothing which he was wearing. This search produced or revealed a hair, a nylon thread, and blood and seminal stains which tended to identify him as the intruder-assailant.

equal protection of the laws, guaranteed by the Fourteenth Amendment, because he was sentenced under statutes which are discriminatorily enforced against Negroes; (2) he was denied due process and equal protection because the Garland County jury lists revealed race and were compiled from racially designated poll tax books; and (3) the taking of his coat while he was in custody, and references to it in testimony at the trial,[5] violated rights guaranteed to him under the Fourth, Fifth, and Fourteenth Amendments.

A. The statute's enforcement. The argument here is that § 41-3403, which prescribes the death penalty for rape, and § 43-2153, which, since its enactment as Acts 1915, No. 187, § 1, permits a jury in a death punishment case to render a verdict of life imprisonment, although perhaps constitutionally valid on their face, have been discriminatorily enforced against members of the Negro race and in favor of members of the white race. It is claimed that in practice "Negroes remain liable to the supreme penalty for the crime of rape, but whites, with very rare exceptions, suffer lesser punishments"; that "there is reason to believe that every person suffering the death penalty has been convicted of a crime against a white woman"; that "All but two of the men executed for rape since 1913 have been Negroes"; that Negro defendants are more likely to be sentenced to death and

[5] No point is apparently made about the fact the coat itself (despite a contrary statement in the Maxwell brief) was not introduced in evidence. In view of this, we do not raise the point on our own accord. We assume that, for present purposes, questions of admissibility are as applicable to testimony concerning the coat as to the coat itself. *McGinnis* v. *United States*, 227 F.2d 598, 603 (1 Cir. 1955); *Williams* v. *United States*, 263 F.2d 487, 488-89 (D.C. Cir. 1959). See *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 391-92 (1920), and *Wong Sun* v. *United States*, 371 U.S. 471, 484 (1963).

only white women are protected by the deterrence of the supreme penalty; that in Garland County (Hot Springs), Pulaski County (Little Rock), and Jefferson County (Pine Bluff), in the decade beginning January 1, 1954, only three charges were lodged against white men for the rape of Negro women; that one of these resulted in an acquittal and the other two in reduced charges; that in the same period seven Negroes were charged with raping white women; that of these, two were sentenced to death, three to life imprisonment, one dismissed, and one not apprehended; that "This history raises serious doubts about the fairness of Arkansas' system of criminal justice"; that the figures are not to be explained by the proportion of Negroes in the state's total population nor by any claim that the crime rate is higher among Negroes, for in the three counties about two-thirds of the rape charges were against white persons; that the proportion of Negroes who receive the death penalty "cries out for an explanation"; that race is the answer; and that the state should be required to come forward with a rational explanation.

It is further argued that there is no basis for assuming a Negro's victims have better character than the victims of whites; that differing sentences for Negroes and whites are consistent with Arkansas' system of justice; that responsibility for administration of penalties in rape cases lies with other officials besides juries; that "it is not what public officials say but what they do which must be determinative when discrimination is at issue"; that in Maxwell's state court proceedings "several occurrences underscored the presence of the racial factor", namely, the use of the term "nigger", the excuse or successful challenge of the nine Negroes who were called for jury service, and

the prosecutor's reference to the race of the defendant and the victim three times during the state trial "under the guise of requesting the jurors to dismiss the fact from their minds"; that the state's laws on segregation and the history of the resistance to desegregation of schools in Little Rock are consistent with the contention that race is a factor in the disposition of rape cases and the imposition of the death penalty; that the court erred in restricting the defense proof of race figures to the three counties; and that, finally, the imposition of the death penalty for rape violates due process in that it is a cruel and unusual punishment.

This question of unconstitutionality in application was raised both in the Supreme Court of Arkansas and in the United States district court. Each tribunal decided the issue adversely to Maxwell. Pp. 117-18 of 370 S.W.2d; pp. 216-17 of 229 F.Supp.

There can be no doubt that the equal protection clause of the Fourteenth Amendment and 42 U.S.C. § 1981,[6] which implements it, (and, it would appear, Art. 2, § 3, of the Arkansas Constitution)[7] operate to invalidate any state statute which would differentiate punishment solely on the basis of race. *Virginia* v. *Rives,* 100 U.S. 313, 318 (1879); *Strauder* v. *West Virginia,* 100 U.S. 303, 307 (1879); *McLaughlin,* v. *Florida,* 379 U.S. 184, 192-94 (1964); see *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942). We recognize, too, that a statute's discriminatory admin-

---

[6] Section 1981. "All persons within the jurisdiction of the United States . . . shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

[7] "The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity, nor exempted from any burden or duty, on account of race, color or previous condition."